FAMILY LAW REVIEW REPORT

HIGHLIGHTS

FROM THE REPORT OF THE MINISTERIAL WORKING GROUP ON FAMILY LAW REFORM

The Ministers of Justice and Social Services have received the Report of the Working Group on Family Law Reform. The eight-member Working Group included representatives of aboriginal organizations, the Status of Women Council, the Law Society of the Northwest Territories and the Departments of Justice and Social Services.

The Report contains 256 recommendations on the reform of family law, based on broad research and consultation. The Working Group employed three researchers who travelled to over 25 communities across the N.W.T. to consult and gather information on traditional customary law. This information was incorporated into the recommendations of the Report.

Northwest Territories family law sets up a framework for resolving disputes that may arise out of the break-up of a family or a relationship. It covers such areas as the division of property between spouses; setting levels of financial support to be paid by one former spouse to another; resolving which parent will have custody of children and deciding the "visiting rights" of the other parent; fixing the level of financial support that a parent should contribute to the cost of raising the children; and deciding how to divide property in the case where someone dies without leaving a will.

Northwest Territories law also sets out rules governing the adoption of children and measures for the protection of the welfare of children.

The Federal *Divorce Act* also addresses financial support for spouses and children, and custody and access questions. This Act applies only if a divorce is applied for.

Family Law Review Report - Highlights

In the Report, the Working Group recommends a new body of legislation for family matters in the Northwest Territories. The recommendations are aimed at ensuring that the laws relating to the family are as sensitive as possible to the values of the people served by those laws.

The Report includes recommendations on:

- **the establishment of Aboriginal Justice Councils with responsibilities in family law matters, operating on a community or regional basis**

- **the structure, mandate and membership of Councils to be determined by communities or regions**

  Working Group members feel that the current system of family law reflects primarily Euro-Canadian cultural values and that aboriginal people have not always been well-served by the existing family law system. Beyond making recommendations that laws attempt to reflect the values of the different cultures of the North, the members agree that it is necessary to provide for the possibility of an alternative to the existing court system for family law matters for aboriginal communities.

  The development of Aboriginal Justice Councils is recommended to enable communities to control their own lives according to aboriginal custom and community-based values. Working Group members suggest that the primary responsibility of Councils be for child welfare and adoption of aboriginal children. The communities themselves should determine what kind of responsibilities will be assumed by Aboriginal Justice Councils.

- **the separation in legislation of legal issues involving children from issues regarding spousal support and property**

  The Working Group recommends a *Children's Law Act*, to deal with issues regarding children separately from property division and spousal support matters. This gives greater

recognition to the importance of children's rights, in the event of a family break-up, as separate from other parental issues.

A *Family Law Act* would cover areas such as spousal support, division of property and domestic contracts.

- **matrimonial property legislation based on a presumption that spouses are entitled to an equal share of matrimonial property**

  Legislation on matrimonial property which recognizes that a marital relationship is an equal partnership is recommended by the Working Group. There should be a stated presumption that both spouses are entitled to an equal share of matrimonial property when the property is divided at the end of a relationship. This would be the case unless there were factors which would make an equal division unfair. The definition of matrimonial property should be extremely broad with few exceptions.

  The Working Group recognizes that in the N.W.T. there are concerns about violence between spouses. They recommend that a tribunal have the right to grant exclusive possession of the matrimonial home to one spouse. When making this decision, consideration should be given to any violence committed by one spouse against the other spouse or children. Violation of these orders should be considered an offence, so that police may ensure that a tribunal decision in a matrimonial matter is respected.

- **common-law partners should have exactly the same rights and responsibilities as married partners**

  The Working Group expresses concern that a large proportion of marital relationships in the Northwest Territories is common-law and that under the current legislation there is little protection for spouses. Common law spouses should be entitled to a fair division of matrimonial property, and to adequate spousal support on the breakdown of a relationship, if the couple has lived together for at least two years, or for

a shorter time if they have children.

The Report also recommends that there should be a legislative framework allowing married and common-law couples to enter into domestic contracts setting out their respective rights during or after the break-up of their relationships.

- **the involvement of aboriginal families in decisions on what happens to property when a family member dies without a will**

  In circumstances where an aboriginal person dies without a will, the Working Group recommends that the decision as to how property should be divided should be made by the family. This would be subject to the claims of creditors. In the case of disagreement the Aboriginal Justice Council could be asked to help out.

- **legal rules to guide the discretion exercised by judges in custody and child support decisions**

  Regarding the custody of children, the Working Group's view is that factors that a judge must consider when making a decision should be spelled out in the legislation. This would help parents predict how a decision would be made if the case went to court and would encourage families to solve custody questions on their own. Families, wherever possible, should be encouraged to determine on their own who has custody of children and what access will be allowed.

  The Working Group believes that child support awards across the country are inconsistent and generally too low. It is recommended that legislation on child support should contain clear guidelines to reduce the inconsistency of awards and standardize awards based on the family's ability to pay.

- **aboriginal custom adoptions should be encouraged**

- **the affirmation of native custom adoptions by Aboriginal Justice Councils instead of by courts**

- **custom adoption practices should not be detailed in legislation**

- **amendments to legislation in the areas of private and departmental adoptions**

- **amendments to help reunite adoptees with their birth parents**

Recommendations on custom adoption encourage the continuation of this practice. Instead of bringing custom adoptions before the court for orders declaring that custom adoptions have taken place, it is recommended that Aboriginal Justice Councils should have the power to issue orders affirming these adoptions, and that the Government recognize these orders for administrative purposes.

Adoption is a primary concern to all Working Group members, especially where aboriginal children are adopted by non-aboriginal families and where they are adopted outside of the Northwest Territories. Recommendations include counselling for birth parents and guidelines for the placement of children that give priority to the extended family and families of the same cultural background.

Recommendations encourage a move toward opening adoption records and facilitating reunions in those cases where both parties are willing.

- **child and family services should be delivered by communities**

- **Aboriginal Justice Councils to develop and apply their own policies and procedures for child protection cases**

- **advocates should be available for families and children appearing before Aboriginal Justice Councils in child protection cases**

The Working Group recognizes that aboriginal people within their communities should be entitled to provide their own children and family services. These services, whether delivered by a community agency or a government

department, should be provided in a manner which recognizes and shows respect for culture, heritage and traditions.

The legislation would set out the framework in which the Aboriginal Justice Councils would operate and establish minimum standards.

In addition to child protection concerns such as neglect and physical or sexual abuse, a child could come into the child protection system if he or she abuses solvents or encourages younger children to abuse solvents.

Advocates appearing with families and children would not have to be lawyers.

Amendments to legislation are needed to make it more comfortable for children to give evidence to Aboriginal Justice Councils.

An Appendix to the Report contains a chapter on Aboriginal Law, outlining an alternative for communities to the current court system for family law matters, the reports on regional research, and technical chapters on substantive areas of family law such as spousal support.

Copies of the Report may be obtained from:

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FAMILY LAW REVIEW REPORT

The Report of the Ministerial Working Group on Family Law Reform

September, 1992

FAMILY LAW REVIEW COMMITTEE
OF THE NORTHWEST TERRITORIES

September 1992

The Honourable Stephen Kakfwi
Minister of Justice

The Honourable Dennis Patterson
Minister of Social Services

It is our pleasure to submit to you the Report of the Ministerial Working Group on Family Law Reform.

The process involved in producing this Report has been a rewarding but arduous one. It has taken longer than originally anticipated to reach this final stage. That it was reached at all, is a testament to the level of commitment of the members of the Working Group. The process has involved a much greater investment of time on the part of the members than was originally expected. All members have full-time positions. In addition, most have family commitments and do extensive volunteer work as well.

Working Group members saw this lengthy process through to the end, because they all believed in the importance of the undertaking. Family law in the N.W.T. is in serious need of reform. Although this Report does not take the form that was expected at the outset of this process, we believe that this Report should be the key tool to be used in the development of a new, current and workable body of family law for this jurisdiction. We are confident that the Government will accord it the importance and priority that we feel it deserves and will make a public commitment to prepare draft legislation as soon as possible.

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Please note that the representative of the then Advisory Council on the Status of Women, Ms Shelley Howell, was a full, participating member of the Working Group, but because of her current involvement with the Ontario Court, she is unable to sign the Report.

Roberta Bulmer

Mary Gillett (Vice-chair)

Sue Heron-Herbert (Vice-chair)

Vicki Treriss

Michele Ivanitz

Cheryl Walker (Chair)

Elaine Keenan-Bengts

FAMILY LAW REFORM REPORT
Table of Contents

INTRODUCTION 1-6

CHAPTER 1: ABORIGINAL LAW 7-10

CHAPTER 2: MATRIMONIAL PROPERTY 11-20
Family Law Act 12
Property Division upon Separation or Divorce 12
Valuation Date 15
Common-Law Spouses 15
Legislative Provisions 16
Possession of Matrimonial Home 17
Domestic Contracts 18
Marriage Contracts 18
Special Considerations for Aboriginal Family Law 19
Succession Law 19

CHAPTER 3: SPOUSAL SUPPORT 21-24
Spousal Support for Common-Law Relationships 23

CHAPTER 4: CUSTODY 25-32
Access 31
Enforcement 31

CHAPTER 5: CHILD SUPPORT 33-42
Joint Custody/Substantial Access 38
Split Custody 39
Extraordinary Expenses 39
Guidelines 40

CHAPTER 6: ADOPTION 43-54
Native Custom Adoption 44
Adoption Legislation 45
Private Adoption 48
Confidentiality in Adoption 51

CHAPTER 7: GUARDIANSHIP 55-58
Amicus 56
Tribunal Jurisdiction Over a Child 56
Custody Enforcement 57

CHAPTER 8: CHILDREN AND FAMILY SERVICES/CHILD WELFARE 59-77
Definitions 61
Basic Principles 63
AJC or Court Ordered Intervention 67
Issues Arising During Tribunal Proceedings 71
Decision of Tribunal 74
Foster Parents 77

INTRODUCTION

Background To The Family Law Review

In 1988, The Honourable Michael Ballantyne, then Minister of Justice, was approached by various interested groups, including the Advisory Council on the Status of Women, Dene Nation, Metis Association, Dene Cultural Institute, Family Mediation Association and the Law Society, about the need to undertake significant reform in the area of family law. In response to that request, the Minister launched a process of comprehensive family law reform. The Honourable Jeannie Marie-Jewell, then Minister of Social Services, also agreed to undertake a review of child welfare and adoption jointly. Both Departments co-funded the project and the Department of Justice directed the contract.

As family law and its reform touch on the lives of virtually everyone in the Territories, it was important to involve as broad a spectrum of interests in the process as possible. Accordingly, consultations took place with Pauktuutit Inuit Women's Association, the Inuit Tapirisat of Canada, the Inuvialuit Regional Corporation, the Native Women's Association of the Northwest Territories, the Dene Nation, the Metis Association of the Northwest Territories, the Law Society of the NWT, the Family Mediation Association and the NWT Advisory Council on the Status of Women.

The structure of the reform process had to allow for extensive participation by interested groups throughout the process. As a result of consultation with these organizations, a Ministerial Committee was appointed with representatives of aboriginal organizations, the Advisory Council on the Status of Women, the local Law Society and the Departments of Justice and Social Services.

The responsibility of the eight members of the Ministerial Committee or Working Group was to provide advice and policy direction to a contractor who would write the report, as well as to consult with and facilitate participation by representative groups and organizations interested in family law. The Working Group members and their backgrounds are:

a. Chair: Cheryl Walker has been the representative for the Department of Justice, Government of the Northwest Territories. In October, 1991, she accepted a position with the Department of Social Services as Director of Family and Children's Services. Ms. Walker has practised law in the Northwest Territories for the last ten years. Her first four years were in private practice in the area of family law. She worked in the Department of Justice for six years, mainly in the area of child welfare and with family law related topics. She was the NWT member of the Federal/Provincial/Territorial Committee on Family Law Policy until October, 1991.

b. Vice Chair: Sue Heron-Herbert has been the representative appointed by the Dene Nation and Native Women's Association of the NWT. Ms. Heron-Herbert attended law school for two years, was the Executive Director for the Native Courtworkers and sat on the Legal Services Board for four years. She is presently a Senior Land Claims Negotiator with the Government of the Northwest Territories, a member of the Arctic Public Legal Education and Information Board, and Chairperson of the Aboriginal Justice Advisory Committee. Ms. Heron-Herbert is the Northern Commissioner for the Native Council of Canada, a member of the Constitutional Review Commission, and Chairperson of the North Slave Housing Corporation.

c. Vice Chair: Mary Sillett was appointed in January, 1990 to replace Rosi Aggark as the representative on behalf of Pauktuutit Inuit Women's Association and Inuit Tapirisat of Canada. Ms. Sillett was born in Hopedale, Labrador and in 1976, she received a Bachelor of Social Work (BSW) degree from Memorial University in St. John's, Newfoundland. She has extensive experience in aboriginal affairs, particularly on Inuit issues, in both the private and public sectors. Ms. Sillett has always been deeply involved in native women's issues and activities. She was asked to chair the first meeting of Northern Labrador Women's Conference of 1978, and served as Chairperson of the Happy Valley Inuit women's group, the Annauqaatigiit, for several years. She was President of Pauktuutit until she resigned from that position to become a Commissioner with the Royal Commission on Aboriginal People.

d. Vicki Trerise was the representative for the Department of Social Services. From 1972-80 she was a founding Board Member and Member of Staff Collective for Nellie's Shelter for Women and Children in Toronto. From 1981-86 she practised law in Ontario, specializing in family and child welfare work. From 1986-87 she was the Provincial Coordinator of Family Violence Initiatives for the Ontario Women's Directorate, and in 1988 was Acting Director, Policy and Research Branch, Ontario Women's Directorate. She spent six months working fulltime for the Department of Social Services in Yellowknife, and since then has continued to serve on the Working Group, while employed by the BC Legal Services Society.

e. Elaine Keenan-Bengts was the representative on behalf of the Law Society of the Northwest Territories. She has practised law for nine years in Yellowknife, mainly in the area of family law. From 1988-90 she was a member of the Executive of the Law Society of the Northwest Territories.

f. Shelley Howell was the representative on behalf of the NWT Advisory Council on the Status of Women (currently the Status of Women Council). She practised law in Ontario before moving to Iqaluit in 1985 to work for Maliganik Tuksisiakvik where she practised family law and did community legal education and training of court workers. She helped to set up Nutaraq Place, a women's transition home, and sat on the Board. In 1988, she moved to Yellowknife to become Executive Director of the Mackenzie Court Workers. In 1989, she assisted in developing the Legal Interpreter Training Program

after which she became a Language Advisor in the Department of Culture and Communications, working on the implementation of official languages. Since July, 1991 she has been working with the office of the Coordinator of Justices of the Peace, Ontario Court, Provincial Division.

g. Bobbi Bulmer was the representative for the Metis Nation. She was President of the Metis Local in Yellowknife until 1991. She was born and raised in the Northwest Territories and is a mother of five. As the President of the Metis Local in Yellowknife she has been involved with land claims negotiations. She worked for the Metis Association on a child care study in 1988. She sits on several boards and is presently manager of North Slave Housing Corporation and chairs the Arctic Public Legal Education and Information Board.

h. Michele Ivanitz was the representative of the Inuvialuit Regional Council. She was employed with IRC as a self government director and political advisor. She has been a member of the Inuvialuit Education Advisory Committee and Inuvik Regional Health Board. In the past, she negotiated the Inuvialuit Health transfer. She is a doctoral student of Anthropology at the University of Alberta.

Mandate and Methodology

The mandate of the Family Law Review was very broad. Policy issues were to be addressed in the following areas: family property, child welfare, adoption, the matrimonial home, support obligations arising out of familial relationships, custody and access, domestic contracts, survivors' rights under succession law, and enforcement of court familial orders.

Research into Northern aboriginal customary family law was to be conducted and incorporated into the report.

Policy papers were to be prepared by a contractor with the help of subcontractors and researchers in aboriginal customary law. The papers on the various areas of family law would be used by the Minister in drafting new family law legislation.

Each Working Group member was to consult with their respective organization before giving direction to the contractor on policy issues and customary law. The Working Group met with the original contractor, Richard Spaulding, and subcontractor, Kate Murray, to give policy direction to them. Richard Spaulding was to write the report. The Working Group met with Mr. Spaulding five times in 1989. The meetings usually lasted four days. Several Working Group members and the contractor met with His Honour Judge Murray Sinclair in September, 1989 while he was Co-Chair of the Manitoba Aboriginal Justice Inquiry. The Working Group met with the contractor in January and March, 1990. At all of these meetings, the contractor would submit policy papers on the topics included in this report to be critiqued by the Working Group. The Working Group then gave refined policy direction. Not all of the

chapters were completed and not all reflect the policy direction given by the Working Group. Drafts of the latter are contained in Appendix II to this Report.

After the contractor resigned from the project in the fall of 1990, the Working Group met twice in 1991. At those meetings, it was agreed that Sue Heron-Herbert, working with Bobbi Bulmar and Michele Ivanitz, would write the Aboriginal Law Chapter. At the final meeting of the Working Group in May, 1991, aboriginal law issues were reviewed in depth. Elaine Keenan-Bengts edited the chapters on child support, spousal support and the division of property, incorporating the recommendations of the Working Group into the papers produced by Kate Murray. Cheryl Walker developed recommendations on custody, access and child welfare based upon consultation with the Working Group at the March, 1991 meeting. She was assisted by Vicki Trerise for the child welfare recommendations. Special thanks goes to all Working Group members who worked so hard to complete the project. All have full time positions and do extensive volunteer work yet they were committed to completing the project.

The Working Group had three researchers to assist them in researching customary family law:

Angie Lantz consulted with people in 17 communities and did research for the Dene/Metis in the Western Arctic. She speaks Chipewyan and has a working knowledge of Dogrib. Bobbi Bulmar assisted Ms. Lantz in preparing the Dene/Metis report contained in this report in Appendix I.

Marie Uviluq consulted with people in nine communities, six in the Baffin and three in the Keewatin. She was born at an outpost camp on Baffin Island and speaks Inuktitut. She visited the Keewatin with Rosi Aggark who is from Arviat. Ms. Uviluq submitted the Baffin/Keewatin report contained in Appendix I.

Michele Ivanitz worked with Billy Day who is from Inuvik. They consulted with people in seven communities in the Kitikmeot/Delta/Beaufort Region. Ms. Ivanitz wrote the Inuvialuit/Kitikmeot report contained in Appendix I.

Family Law

Members of the Working Group were united in recognizing that family law legislation in the NWT is in dire need of reform as this jurisdiction trails badly with respect to changes that have taken place elsewhere across the country. Rather than limiting themselves to patching together changes to existing statutes, the members of the Working Group preferred to propose the parameters of a new body of comprehensive legislation.

The intention of the Working Group was to recommend that the laws of the Northwest Territories relating to the family be made as sensitive as possible to the values of the

aboriginal majority that is served by the laws. There was an effort to seek out the elements of commonality of values between aboriginal and non-aboriginal peoples. The recommendations contained in this Report, on a new body of family laws, reflect the views of all of the representatives on the Working Group.

The Working Group recommends a *Children's Law Act*, so that legislation dealing with children would be in a separate statute from property division and spousal support. This division would give greater recognition to the fact that children's rights are separate from parental issues and property. This legislation would be separate from child welfare legislation which comes under the mandate of the Department of Social Services.

The Working Group also recommends that there be a *Family Law Act* which deals with spousal support, property division, domestic contracts, the matrimonial home, and property of common law spouses and all issues relating to these topics.

Aboriginal Justice Councils

Working Group members were also united in recognizing that the existing regime of family law reflects primarily Euro-Canadian cultural values and that aboriginal people have not always been well-served by the existing family law system.

As stated above, the Working Group endeavoured to make their recommendations reflective of the values of the different cultures in the North. However, Working Group members eventually concluded that it was insufficient simply to modify laws of uniform application to make them more sensitive to aboriginal cultures. It was agreed that it was necessary to go beyond this step and to provide for the possibility of the establishment of an alternative to the existing court process for those communities and regions that felt it was necessary.

There were a number of reasons why this was so. Not only would it be a difficult task to "sensitize" laws of general application, but regional differences would make it almost impossible to devise a single legislative structure to satisfy all interests.

In the final analysis, the reason for the recommendation of the Working Group for the creation of an alternative system is rooted in the very nature of the existing system. The rigid, legislated, adversarial dispute-resolution model embodied in the existing system of family law is not only foreign to, but destructive of, aboriginal cultures and values. A move away from this model toward a flexible, conciliatory, non-confrontational model rooted in aboriginal custom and controlled by the communities, is required.

The members of the Working Group also had concerns about the current Northwest Territories Court structure and court circuit system. Presently there is a pronounced emphasis on treating criminal matters as a priority. The Working Group feels that the health, safety and well-being of children should be the priority of decision-making bodies.

Accordingly, this report recommends the establishment of Aboriginal Justice Councils to enable communities to control and govern their own lives according to aboriginal custom and community based values. This mechanism is discussed in Chapter I on aboriginal law below and in Appendix I.

Once this mechanism is established, different bodies will be making decisions about family law cases across the Territories. The principles and recommendations laid out in this Report apply to the different decision-making bodies depending on the circumstances. For that reason, we have used the expression "tribunal" to refer to either the Aboriginal Justice Council or the courts of law, as the case may be.

Because of the importance of the recommendation regarding the establishment of Aboriginal Justice Councils, the Report will begin with the chapter on aboriginal law before moving on to a consideration of specific areas of family law in subsequent chapters.

CHAPTER 1:
ABORIGINAL LAW

As indicated in the introduction, Working Group members were concerned about the difficulties of administering family law according to a set of rules and procedures that are in many cases foreign to the communities that they serve.

In order to allow communities to govern their lives according to aboriginal custom, the Working Group recommends the establishment of Aboriginal Justice Councils on either a community or regional basis. The primary responsibility of these councils would be for child welfare and the adoption of aboriginal children. They could also have jurisdiction for administering and deciding on other family law issues such as property division, maintenance and support for spouses and children, custody and access of children, and intestate succession.

The establishment of Aboriginal Justice Councils would constitute a necessary change to the current child welfare and social services delivery models. Communities must control and govern their own lives according to aboriginal custom and community-based values to preserve the essence of aboriginal society. In order to empower communities and accomplish ownership of program delivery, there has to be a shift away from the sole focus of child protection and individual rights to an enhanced perspective that focuses upon supporting and strengthening extended families and communities. The maintenance of relationships between children, parents, extended families and communities is paramount if aboriginal communities are to survive. Community residents must be involved in not only defining and carrying out justice, but in implementing changes required to solve their own problems.

It is recommended that Aboriginal Justice Councils be set up in the following regions, taking into account cultural differences:

a. Gwich'in, Sahtu, Deh Cho, North Slave, and South Slave;
b. Inuvialuit Settlement Region;
c. Kitikmeot Region;
d. Keewatin Region;
e. Baffin Region.

Each region will decide how to structure their Aboriginal Justice Councils. Some regions will provide overall coordination for the communities, while others will leave it to individual communities to assume responsibility for some or all programs and services. It will be the decision of the regions and communities to find the model which best works for them. Not all communities within a region will be able to assume all programs and services at the same time. A framework that allows for a transition period is essential.

The communities themselves should determine the degree of responsibility that they want to exercise in family law matters.

Aboriginal Justice Councils may introduce codes if they find there is a need or a desire to do so, but they should have the option to either adopt the existing legislation as their own, modify it, or restrict their activities to the development of policy if they so choose. This fact should be identified in legislation, for the sole purpose of recognizing and sanctioning custom law, not to codify law which varies from community to community and region to region. Certain principles or fundamental concepts or minimum standards may be identified within the legislation as being universally applicable. These would not be subject to modification by community codes.

The Working Group recommends that "Aboriginal Family Law Jurisdiction" be recognized in legislation, but not codified. This will allow for jurisdictional sanction but will permit the flexible nature of aboriginal law to continue.

In order to allow for the transfer of responsibilities for child and family services to communities and regions, the Working Group recommends a flexible legislative model that allows for the transfer of responsibilities in different ways such as by agreement or by appointing councils that develop codes. Therefore, the legislation needs to state general principles and have minimal guidelines. It should be a model that allows for the development of delivery of service and practice tailored to the needs of a region or community.

Precise mechanisms can be worked out with each community outlining who is eligible to serve on such Councils, how the members will be chosen, jurisdiction of the council, and, if they wish, appeal mechanisms.

When Aboriginal Justice Councils are established, Working Group members recommend that appointees be familiar with and sensitive to the need to protect children and to prevent family violence. It is important that women in the community be consulted about appointees and be considered for appointments because in the community much of the responsibility for the raising and nurturing of children is with the women.

It is expected that in Dene and Metis communities all persons in the community or region will fall under the jurisdiction of the Aboriginal Justice Councils. In these communities, there will be no option in these cases: the process is mandatory, rather than by choice. If a person chooses to live in a community, they must abide by the codes governing the community or region.

This does not mean that once a decision has been made, it cannot be changed, but rather the decision-making process is holistic in nature. Decisions can be reviewed and amended by the parties to adapt to the changing needs of family units, such as changes in employment, housing, alcohol treatment, etc. This is not a formal appeal mechanism, rather it is an ongoing review process to deal with changes.

The Inuit and Inuvialuit communities have shown a desire to adopt a slightly different model: it is recommended that there must be a provision to opt out of the Aboriginal Justice Council model into the legislative model. Inuit and Inuvialuit also wish to protect the right to appeal decisions made by Aboriginal Justice Councils in order to protect themselves from being restricted to one level of decision making. Although the exact nature of the structure is left open, this could be accomplished through regional bodies with representation from each community in that region.

Further discussion of Aboriginal Justice Councils can be found in the Aboriginal Law Chapter in Appendix I.

NOTE: The representative of the Law Society has expressed reservations on the proposed jurisdiction of the Aboriginal Justice Councils. Although she is comfortable with child welfare matters being dealt with by community councils, she would not see the jurisdiction of the councils extending to include other matters, nor would she see the councils having exclusive jurisdiction based on geographic location. As a third area of concern, she would I like to see, as a minimum, an avenue of appeal to the Supreme Court of the NWT. Ideally she would prefer to see this Court maintain original jurisdiction in family matters.

CHAPTER 2:
MATRIMONIAL PROPERTY

Introduction

We acknowledge that the policy we are making for division of property upon separation or divorce is more consistent with Ontario's, debtor-creditor policy-based legislation rather than property division per se.

We recognize that we are talking about equalization entitlements for the disadvantaged spouse. We do not endorse the original contractor's recommendation that equalization entitlements become property entitlements.

The Northwest Territories has a small population. Therefore the number of cases that go before the courts is limited. We feel it is appropriate to pass legislation that is consistent with other provinces and territories so that interpretation will be easier for individuals involved in matrimonial breakdown and for their lawyers. The legislation on property should allow the parties flexibility in evaluating and dividing property. It must allow the parties to decide, where applicable, whether or not capital gains taxes should be triggered.

It is the unanimous recommendation of the Working Group that compensation for loss of earning capacity in one spouse and/or the enhanced earning capacity in the other spouse during the course of the marriage, be dealt with as support and not as a property asset. There are many reasons for this decision including the fact that valuation would be extremely expensive, and require actuarial evidence. Income tax implications and *Bankruptcy Act* implications have not been examined thoroughly. If adjustments for compensation for loss of earning capacity or the cost of investment in a spouse's education or occupation are dealt with under spousal support, at least for tax law purposes, there are income tax bulletins and case law from other jurisdictions upon which family law practitioners can rely.

We recognize that amendments to family law legislation when needed, should be a priority with any Legislative Assembly.

Recommendations

Family Law Act

1. **We recommend** that there be a Family Law Act which deals with spousal support, property division, domestic contracts, the matrimonial home, and property of common law spouses and all issues relating to these topics.

Property Division Upon Separation and/or Divorce

2. We recommend that the legislation explicitly recognize that a marital relationship is an equal partnership involving joint and equal responsibilities and contributions. There should be a presumption that both spouses are entitled to an equal share of matrimonial property.

3. We recommend that matrimonial property include all property including business and family assets owned jointly or separately by each spouse. **We recommend** that the definition of matrimonial property should be extremely broad and shall capture any present/future real or personal property. Provision is made for some exceptions set out in subsequent recommendations. The representative of the Law Society does not recommend that the definition include future real or personal property unless there is clear evidence of intent.

4. **We recommend** that property to be excluded from matrimonial property shall be:

    a. damages from personal injuries or part of a settlement that represents these damages;

    b. proceeds or a right to proceeds of a policy of life insurance that are payable upon the death of the life insured;

    c. property other than the matrimonial home that the spouses have agreed by a domestic contract is not to be included in the spouse's matrimonial property.

5. **We recommend** that matrimonial property include a spouse's right under a pension plan, including those pension plans that have invested contributions made by other persons or corporations. Included in matrimonial property would be the value of pensions acquired during the marriage.

6. **We recommend** that the tribunal have the option to divide a pension in specie or by capital valuation, thereby giving the tribunal the opportunity to do what is fair in the circumstances. We do not recommend that disability pensions be considered property, rather income, to be considered in determining spousal support. This allows for

variation in support orders when circumstances change. If considered property, then it is divided once and variation is preempted.

7. **We do not recommend** that debts be considered property in that we do not want to go so far as to impose a new debtor on a third party creditor, although debts must be taken into consideration when dividing property.

8. **We recommend** there be a presumption that matrimonial property is to be divided equally between spouses upon breakdown of marriage or separation.

9. **We recommend** that in order to justify a different division, a tribunal should be satisfied that an equal division would be inequitable or unfair having regard to a number of factors including:

   a. the duration of the marriage;

   b. the length of time the parties have been separated;

   c. the date when the property was acquired or disposed of;

   d. a spouse's failure to disclose to the other spouse debts or other liabilities existing at the date of the marriage;

   e. the fact that debts or other liabilities claimed in reduction of a spouse's net family property were incurred recklessly or in bad faith;

   f. a spouse's intentional or reckless depletion of his/her net family property;

   g. the needs of each spouse to become or remain economically independent and self-sufficient;

   h. the needs of children and the financial responsibility attached to custody of children (on the assumption that children, when they become part of a family, also become part of the partnership to the extent that they consume a share of the partnership wealth);

   i. actual contribution, either direct or indirect, to the acquisition of matrimonial property where it can be shown that it would be inequitable, in the circumstances of the case, for one party to share equally in the matrimonial property;

   j. any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse.

10. **We recommend** the presumption of equal division should be clearly stated, similar to Ontario legislation, or in the British Columbia Law Reform Commission Report, which states "child care, household management and financial provisions are the joint responsibilities of the spouses and inherent in the matrimonial relationship there is an equal contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities, entitling each spouse to an equal share in family assets subject only to considerations set out in section 51." The reference to section 51 refers to considerations similar to those contained in recommendation 9.

11. The Working Group was not in agreement on the issue of allowing business assets to be excluded from division. One **recommends** that, subject to any agreement between the spouses to the contrary that is in writing, business assets shall be divisible matrimonial property unless there is clear evidence that the non-owning spouse did not contribute in any way to the acquisition or development of the business and would be unjustly enriched by such a division. **Three recommend** that there be no distinction for business assets and that the tribunal can only consider an unequal division of all assets under recommendation 10. This is to avoid allowing the tribunal to say a wife in a traditional role who raised children did not contribute towards acquiring a business.

12. **We recommend** that matrimonial property, subject to division, be defined in such a way as to exclude the value of assets brought into the marriage except the matrimonial home, as well as the value of gifts and inheritances received during the relationship.

13. **We recommend** that there be discretion for the tribunal to declare that a non-owning spouse is entitled to an interest in an excluded asset if a failure to include the excluded asset in the division of family property would be unfair having regard to:

    a. the extent, if any, to which the non-owning spouse contributed to the acquisition, management, maintenance, operation or improvement of the excluded assets;

    b. the extent, if any, to which the excluded assets changed in value or form after the marriage or acquisition; and

    c. the duration of the marriage.

14. **We recommend** that the value of assets owned by either party at the time of marriage and the value of gifts and inheritances at the time of acquisition, be deducted from the value at the time of division.

15. **We recommend** any claim or potential claim for personal injury damages incurred during the marriage should not be a divisible asset. Also, pain and suffering incurred as a result of personal injuries is personal and compensation payments should be

exempt from property division. Rather, these can be considered by the tribunal under support.

16. **We recommend** that professional credentials and job skills be specifically exempted from the division process and be dealt with instead in the context of spousal support. **We recommend**, however, that there be specific recognition of any direct financial contribution to the owning spouse's cost of acquiring the skill and that compensation should be awarded for that direct contribution within the context of property division.

17. When talking about divisible business assets, **we recommend** that valuation should assume the continuing input of the skills and qualifications of the owning spouse at the date of valuation, and should not be limited to the value of the tangible assets of the business or the market value of the capital assets and equipment.

Valuation Date

18. **We recommend** that there be a valuation date similar to the one proposed in the Ontario legislation, which means the earliest of the following dates:

    a. the date the spouses separated and there is no reasonable prospect that they will resume cohabitation;

    b. the date the divorce is granted;

    c. the date the marriage is declared void; and

    d. the date before the date on which one of the spouses dies leaving the other spouse surviving.

19. **We recommend** the addition of a provision providing the tribunal with discretion to set a different valuation date for one or more assets if there would otherwise be an unfair result.

Common Law Spouses

20. We recognize that a large proportion of marital relationships in the NWT are common-law. There is a need to provide a similar scheme for the division of property upon breakdown of these relationships. There is a concern that the current minimal protection provided by constructive and resulting trust applications, provides no protection against the dissipation of assets by the spouse who has the property in his/her name. Therefore, **we recommend** where a couple has resided together for two years or where there is an indication of some permanence with one or more child adopted or born of the relationship, then property shall be divided in the same manner

as for married couples. For the purpose of these recommendations, parties to a marriage or these qualifying relationships shall be referred to as spouses.

Legislative Provisions

21. **We recommend** that there be protections for spouses built into the Family Law Act. These would include the determination of questions of title between spouses. The tribunal should have the power to:

    a. declare the ownership or right to possession of particular property,

    b. order payment and compensation for the interest of either party if property has improperly been disposed of,

    c. order that property be partitioned or sold,

    d. grant orders for the preservation and protection of spouses' interests including the retaining and depletion of a spouse's property,

    e. grant orders for possession, delivering up, safe keeping, and preservation of property.

22. **We recommend** that there be provision in the legislation that prevents spouses, by way of will, from defeating the purpose of this legislation when dividing property between spouses.

23. **We recommend** a provision, similar to that in Ontario, that allows a surviving spouse to elect to take either under the will or receive the entitlement that they would receive under this legislation.

24. **We recommend** that the requirement of both spouses to declare fully their property, debts and liabilities, be included in the legislation. **We recommend** that the legislation indicate that this disclosure cannot be used for any purpose other than resolving the division of property between spouses, and support.

25. **We recommend** there be provision in the legislation allowing for the designation of a matrimonial home. Because of the shortage of housing in many communities and the fact that many families reside in government housing units and housing association units in the communities, **we recommend** that legislation should give both spouses the right to possession of the matrimonial home where possession is not related to employment. **We also recommend** that no spouse shall be allowed to dispose of or encumber an interest in the matrimonial home, unless the other spouse consents to the transaction or releases his/her rights in writing and that remedies be available if one spouse wrongfully disposes of or encumbers an interest in a matrimonial home.

26. **We recommend** that the tribunal should have the legislated power to determine whether or not the residence is a matrimonial home. The tribunal should also have the power to order the disposition of the matrimonial home, if the tribunal finds that the spouse whose consent is required, cannot be found or is not capable of giving consent or is unreasonably withholding consent.

27. **We recommend** that the tribunal be allowed to impose conditions including provision by one spouse to the other of comparable accommodation, or payment in place of it.

Possession of Matrimonial Home

28. **We recommend** that the tribunal should have broad powers to deal with possession of the matrimonial home including:

    a. allowing one spouse to have exclusive possession,

    b. allowing one spouse to make payments to the other spouse as a result of the exclusive possession order,

    c. granting an order over the contents of the matrimonial home thereby allowing the contents to either remain in the home for the use of a spouse or a child that is given possession or to be removed from the home for the use of a spouse or a child.

29. **We recommend** that the considerations the tribunal may take into account in making an order for exclusive possession should include:

    a. the best interests of the children affected;

    b. any existing orders including orders for support;

    c. the financial position of both spouses;

    d. any written agreement between the spouses;

    e. the availability of other suitable and affordable accommodation; and

    f. **any violence committed by a spouse against the other spouse or children.**

30. **We recommend** that an offence be created for any person who contravenes an order for exclusive possession with penalties up to $1,000 or imprisonment up to three months for a first offence, and in subsequent offenses fines of up to $10,000 and imprisonment for two years.

31. **We recommend** granting the police the power to arrest without warrant anyone they believe on reasonable grounds to have contravened an order for exclusive possession.

32. **We recommend** that legislation applicable to matrimonial homes should apply to people who are married before or after the legislation comes into force and whether the matrimonial home is acquired before or after the Act comes into force.

Domestic Contracts

33. **We recommend** that there be provision in the legislation that allows for two parties to a relationship to enter into cohabitation agreements, marriage contracts, paternity agreements, and separation agreements.

34 **We recommend** that a tribunal be given power to set aside a cohabitation agreement, marriage contract, separation agreement, or a provision in it if a party fails to disclose to the other, significant assets, or debts or liabilities that existed when the contract was made, or if a party entered into the agreement without knowledge of his or her rights or was subjected to coercion by the other party. The representative of the Law Society goes further and **recommends** that such appointments should be properly executed with independent legal advice.

Marriage Contracts

35. **We recommend** that legislation provide that a man and woman who are married, may enter into an agreement dealing with their respective rights in the marriage or on separation or dissolution of the marriage or on death, including all property except the matrimonial home.

36. **We recommend** a provision in the legislation that renders unenforceable terms in a marriage contract that limit a spouse's rights under the legislation to the matrimonial home.

37. **We recommend** that spouses who are living separate and apart may enter into an agreement on their respective rights and obligations including:

    a. ownership in or division of property;

    b. support obligations;

    c. directing the education, moral and/or cultural training of their children;

    d. the right to custody of and access to their children.

    Articles b, c and d are subject to review if not in the best interests of the child.

Special Considerations for Aboriginal Family Law

38. The aboriginal members of the Working Group supported by the non-aboriginal members want the legislation to emphasize that any decision-making body dealing with all matters of property division should emphasize the avoidance of displacing families and children. Legislation must require decision-making bodies to consider what is fair for families. This means that in the communities in particular, legislation would have to ensure that exclusive possession orders can be given for leasehold property.

Succession Law

39. **We recommend** that, where a deceased spouse who dies without a will is aboriginal or where the children are of aboriginal descent, a decision as to how property will be divided shall be made by family. It shall be the responsibility of the family to determine who is family for the purpose of making these decisions. If there is a dispute about the dispersal of the assets, these issues can be brought before the Aboriginal Justice Council for mediation. In succession law matters, the resolution of conflict is opted into. It is not mandatory. The Public Trustee only becomes involved in estates at the request of a family but subject to the lawful claims of creditors, the family shall have the ability to disperse personal effects prior to the involvement of the Public Trustee.

40. **We recommend** that for succession law, the rights of a person who co-habits with another for two years or who is in a relationship of some permanence and is the natural or adoptive parent of a child, should be the same as those of a married person.

41. **We recommend** that where a spouse dies without a will and with no children, then the surviving spouse should be entitled to all of the deceased spouse's property. **We recommend** where a spouse has issue and dies intestate, having a net value of not more than $75,000, the surviving spouse is entitled to the property absolutely.

42. **We recommend** that where a person dies intestate in respect to property and leaves a spouse and one child, the spouse is entitled to one half of the residue. If there are two or more children surviving with the spouse then **we recommend** that the surviving spouse receive one third of the residue and the balance of the estate goes to the children in equal shares.

43. **We are not recommending** that succession law detract from Dependants Relief legislation.

CHAPTER 3:
SPOUSAL SUPPORT

Introduction

The aboriginal research demonstrated that in traditional families the resolution of spousal support for aboriginal families, wherever possible, is done within the family and extended family. We recognize that aboriginal families rely on extended families for support upon dissolution of a marriage or matrimonial relationship. If support for a spouse cannot be resolved between the parties or within the family, then the Aboriginal Justice Council will determine what support should be provided between spouses. If the family agrees to fall under the jurisdiction of the Aboriginal Justice Council, customary law will apply over non-aboriginal law. Both parties can opt out of the community model for the legislative model but there should still be input allowed by the community and family and this should be respected in the legislation. In mixed marriages, customs should also be considered. Again, both parties would have to agree to opt into the legislative model.

We are cognizant of the fact that to aboriginal people, child support and the responsibility of each parent to support their children comes first and foremost. These rights are to be the primary focus upon separation of spouses. The rights of parents in relation to the children are a consideration after the rights of the children. Therefore, in aboriginal spousal support situations presumably child support will have been resolved before one looks to spousal support or division of property.

For non-aboriginal relationships, the Working Group rejects the notion that entitlement to support of a spouse is predicated upon need.

Recommendations

44. **We recommend** a spousal support scheme that directs the tribunals to award spousal support to compensate a spouse for loss of income and incapacity arising from the marriage (referred to in Appendix I, Spousal Support chapter, as the unenhanced spouse), whether or not there is a demonstrated need for support, and that such support orders should be modifiable only in the most exceptional of circumstances. Legislative emphasis should provide for equal economic recognition of non-monetary services provided by the unenhanced spouse as well as the sacrifice by one spouse in the job market, so that the other's earning potential is enhanced. It should be clear in the legislation that spousal support is **not** rehabilitative support and it is **not** specific for a determinable period of time until the recipient is in a position of self-support.

45. **We recommend** that in the absence of evidence of an agreement to the contrary, spouses should be deemed to have an expectation that enhanced and diminished earning capacities, which result from marital investments and human capital or the division of marital functions, will be shared over the course of the marriage. This expectation should generally be respected on marriage breakdowns unless an aspect of the marriage breakdown justifies disregarding these expectations so that a lesser support order would be made. This would be in unusual circumstances and nothing should justify leaving one spouse better off at the expense of the other.

46. **We recommend** on separation that a spouse should be compensated for any diminished earning capacity which results from the division of marital responsibilities and roles. The unenhanced spouse should be fully compensated for any investment in the enhanced spouse's occupation or education along with an adequate rate of return which reflects the risk level of the investment in human capital. This should be the minimum economic remedy for contribution to the marriage available to an unenhanced spouse on marriage breakdown.

47. **We recommend** to assist in calculating compensation to an unenhanced spouse, the legislation should provide appropriate guidelines for factors to be considered and make it absolutely clear that the intention of spousal support is to compensate for the value of time and effort put into the marriage partnership as well as a return on the investment put into the marriage. The most important factor to be recognized should be that there is a cost in terms of loss of future earning capacity that continues beyond marriage each time there is an interruption of employment. Therefore, the tribunal must be directed to consider time taken out of the wage economy for the purpose of enhancing the other spouse in any way, for example, by bearing or rearing children, by moving with the enhanced spouse, or by placing secondary importance on one spouse's career in order to accommodate the other spouse's career.

48. **We recommend** the second factor that the tribunal should be directed to recognize when making spousal support orders, that where there are children of the marriage, the custodial spouse experiences ongoing marriage related diminishment of earning capacity. This exists beyond the point of marriage breakdown and must be accommodated accurately. Apart from the diminished earning capacity of the non-enhanced spouse resulting from the marriage, there are real constraints on the custodial spouse's ability to earn income after the marriage breakdown because of child rearing responsibilities. Types of employment available may be limited as the demand of tending to the needs of children takes away from time and energy one would otherwise have to devote to a career.

49. **We recommend** that another factor appropriate to determine the rate of spousal support would be contribution made by each of the spouses to the income earning capacity of the other. This would include a situation where one party supports the

family while the other party completes an education or otherwise acquires credentials to advance his or her career.

50. **We recommend** that compensation for investment in a spouse's occupation should not be based on a spouse's subsequent remarriage or co-habitation with a new partner. Nor should it be related to need or to the previous marital standard of living. Following through on this rationale it is realistic that compensation for investment in a spouse's education can occur even in short term marriages.

51. The chapter on spousal support in Appendix I discusses many formulae available to assist a court in valuing spousal support. **We recommend** following Krauskopf's approach, which is set out on page 32 of the chapter, as the most appropriate for evaluating the award. An award should vary to the extent that the evidence in the case reflects the expectations of the particular couple. The initial expectations of the parties may change during the marriage with the arrival of a child or a move to pursue the advance of the enhanced spouse's career. The whole dynamic of the marriage as an evolving partnership would have to be considered in each case.

52. **We recommend** that if the record contains evidence of the present value of the earning capacities as a result of investment in one spouse's human capital by the other spouse, but no evidence is available of alternative expectations to equal division on the part of both spouses, the economic model of the family operating as a unit to increase the specific human capital would justify a presumption that the parties expected to share equally in the present value of the enhanced and diminished earning capacity.

Spousal Support for Common Law Relationships

53. **We recommend** that for common-law relationships there be provision for spousal support awards in circumstances where a man and woman:

    a. have co-habited for a period of at least two years; or

    b. have co-habited in a relationship of some permanence if they are together the natural or adoptive parents of a child.

54. **We recommend** that once a couple has qualified under the preceding recommendation there should be no distinction between married and unmarried spouses rights. Therefore, **we recommend** that there be NO statutory limitations upon a common law spouse's right to make application for support. We are not certain that a limitation period could survive a Charter challenge.

Conclusion

Although we have not been able to determine the formula or guidelines for calculating compensation, **we recommend** that the legislation be clear that spousal support shall **not** be based on need. The legislation must clearly state that the intent is to compensate for ongoing diminished income earning capacity and to fully compensate for the investment made by the unenhanced spouse. The focus of the inquiry should change enough to ensure that the quantum of support actually does reflect the value of the investment made. We recognize that we are talking about equalization entitlements for the disadvantaged spouse.

The Working Group rejected the idea of the original contractor that spousal support should become a property entitlement. There was not enough time or expertise to examine the implications under the *Bankruptcy and Income Tax Acts* as well as debtor creditor rights and the impact on the current Maintenance Enforcement Program which provides reciprocal enforcement services for support orders with the other jurisdictions in Canada. If adjustments for compensation for loss of earning capacity or for the cost of investment in a spouse's education or occupation, are dealt with under spousal support, at least for tax purposes, there are income tax bulletins and case law from other jurisdictions upon which family law practitioners can rely.

CHAPTER 4:
CUSTODY OF CHILDREN

Introduction

The Working Group recommends that there be a *Children's Law Act* so that all legislation dealing with children would be in a separate statute from property division and spousal support. This division would give greater recognition to the fact that children's rights are separate from parental issues and property. This legislation would be separate from child welfare legislation which comes under the mandate of the Department of Social Services.

The Working Group would like to point out that the chapter prepared on custody and access by the contractor is not reflective of the direction given by the Working Group members. Although the chapter is included in Appendix II, recommendations or policy statements contained in it should not override the recommendations of the Working Group members. Determination of the ideal custody arrangement for children of divorced and separated parents was the most debated issue of the Working Group. There is very little consensus on how custody should be determined in a non-aboriginal legislated setting. Therefore, we will be identifying, where necessary, the individual recommendations of the Working Group members.

We recommend that there be an effort to identify in legislation, legal rules that minimize judicial discretion in arriving at custodial disposition. The Committee members want to see a checklist to help parties self-determine custodial arrangements in order to reduce litigation by allowing them to ascertain what the results would be if the matter was litigated. For aboriginal families where at least one parent is aboriginal, the parents, wherever possible, will determine who has custody and what access will be allowed. If the parties cannot resolve it between themselves, the Aboriginal Justice Council will determine custody and access with input from the family. The Council will take into consideration commitments made by other family members to assist the custodial parent. If the family agrees to the jurisdiction of the Aboriginal Justice Council, then customary law will take precedence over non-aboriginal law. If both parents choose to opt for the legislated model, there should be input allowed by the community and family in any custody dispute. Both parties have to agree to opt into the legislated model otherwise the community model will prevail.

For aboriginal people, mediation is viewed as an important and viable alternative within the community to a Court system. The whole Working Group supports mediation for custody, access and support if it can be provided by one or not more than two community mediators. Mediation must be done by an appropriate person from within the community. Mediation must be consensual and must be in the best interests of the couple. The goal of mediation

would be to support both sides equally, to understand and help define the problem, and help them to see ways to work it out.

The Working Group is opposed to any type of tribunal mandated mediation in custody disputes or any expectation that a couple try mediation before being able to apply to a tribunal to have the custody dispute resolved. Opposition to mandated mediation is based on the lack of mediation services available in the Northwest Territories. Also, it is inappropriate to mandate mediation disputes in cases which involve allegations of family violence. Also it would be very difficult to find a mediator in the Northwest Territories who could deal with innumerable cultural differences. There is a serious concern about the ability of mediators to do cross cultural mediation.

Recommendations

55. **We recommend** that there be a Children's Law Act so that all legislation dealing with children would be in a separate statute from property division and spousal support. This division would give greater recognition to the fact that children's rights are separate from parental issues and property. This legislation would be separate from child welfare legislation which comes under the mandate of the Department of Social Services.

56. **We recommend** that there be an effort to identify in legislation, legal rules that minimize judicial discretion in arriving at custodial disposition. The Committee members want to see a checklist to help parties self-determine custodial arrangements in order to reduce litigation by allowing them to ascertain what the results would be if the matter was litigated. Families, wherever possible, will determine who has custody and what access will be allowed. If aboriginal families cannot resolve these issues themselves, the Aboriginal Justice Council will determine custody and access with input from the family. The Council will take into consideration commitments made by other family members to assist the custodial parent. If both parents choose to opt for the legislated model, there should be input allowed by the community and family in any custody dispute. Both parties have to agree to opt into the legislated model otherwise the community model will prevail. The representative of the Law Society does **not recommend** that both parties be required to opt into the legislated model where only one party is an aboriginal person.

For the legislated model the recommendations for determining custody are as follows:

57. **We recommend** that the best interests of the child be considered in determining the ideal custody arrangement for children.

58. The Working Group member from Social Services, Vicki Trerise, and the Working Group member from the Status of Women Council **recommend** the use of the primary caretaker model unless both parents feel that a joint custody regime is workable. Sole physical and legal custody should be awarded to the parent who performed primary caretaking functions during the marriage. The list of factors to determine the primary caretaker would be as follows:

    a. providing directly for the day-to-day physical needs of the child, eg. meals, bathing, grooming, dressing;

    b. providing shelter, food, clothing and other material means of support;

    c. arranging for medical care, including nursing and trips to physicians;

    d. arranging for social interaction among peers and family members;

    e. arranging alternative care, i.e. babysitting, day care, etc.;

    f. putting the child to bed at night, attending to the child in the middle of the night, waking the child in the morning, interaction with the child including talking to the child, disciplining, i.e. teaching general manners and toilet training;

    g. educating, i.e. religious, cultural, social, etc.;

    h. teaching elementary skills; and

    i. interacting with the child in an intimate way, such as cuddling, hugging, and playing.

59. They also **recommend** that included in the checklist would be a statement about the importance of teaching cultural and spiritual identity and encouraging its development. This statement should either be in the checklist or a consideration when applying the checklist.

60. They **recommend** that the checklist create a rebuttable presumption that the custodial parent should be the one who is the primary caretaker. If both parents are primary caretakers or neither is found to be the primary caretaker, then a checklist approach should be followed involving the following factors:

    a. the views and preferences of the child, where they can reasonably be ascertained;

    b. the love, affection and emotional ties between the child and

        i) each person claiming custody of, or access to, the child;

ii) each person to whom access to the child is granted;

iii) other members of the child's family and, in particular, each sibling of the child;

iv) persons involved in the care and upbringing of the child;

c. the permanence and stability of the family unit with which it is proposed that the child will live;

d. the effect upon the child of any disruption of the child's sense of continuity;

e. any plans proposed for the care and upbringing of the child;

f. the child's cultural, linguistic or religious upbringing.

If one party wants to challenge the rebuttable presumption, then this list should be utilized.

61. The Working Group member from the Status of Women Council is in agreement with the Working Group member from Social Services. The Status of Women Council representative **recommends** that there should never be a presumption of joint custody at any stage. Joint custody can only occur with the consent of both parents.

62. Representatives from the Law Society of the NWT and the Department of Justice **recommend** consistency with other legislation throughout the country. Therefore, they **recommend** a best interests of the child test with the enumerated factors similar to those in the *Divorce Act*, Yukon and Ontario legislation. Included as one of the factors used to determine the best interests of the child, would be the primary caretaker. This has been added to the enumerated factors in the Ontario legislation by way of recent amendment. However, these two representatives **recommend** clearer wording than the Ontario wording which states, "The ability of each person seeking custody or access to act as a parent." The representatives would prefer the wording to be "the amount of time spent as primary caretaker for the child." These members also **recommend** another factor which would be applicable in cases where aboriginal persons had opted into the legislated model. This factor would require any person seeking custody to "educate the child and maintain the cultural and spiritual development of the child." The other enumerated best interest factors are taken from the Yukon and the Ontario legislation. They are as follows:

Ontario:

a. the love, affection and emotional ties between the child and,

i) each person seeking custody or access,

ii) other members of the child's family residing with him or her, and

b. the child's views and preferences, if they can reasonably be ascertained;

c. the length of time the child has lived in a stable home environment;

d. the ability of each person seeking custody or access to act as a parent;

e. the ability and willingness of each person seeking custody to provide the child with guidance, education and necessities of life and to meet any special needs of the child;

f. any plans proposed for the child's care and upbringing;

g. the permanence and stability of the family unit with which it is proposed that the child will live; and

h. the relationship, by blood or through an adoption order, between the child and each person who is a party to the application or motion.

Yukon:

a. the bonding, love, affection and emotional ties between the child and,

i) each person entitled to or claiming custody of or access to the child,

ii) other members of the child's family who reside with the child, and

iii) persons involved in the care and upbringing of the child;

b. the views and preferences of the child, where such views and preferences can be reasonably ascertained;

c. the length of time, having regard to the child's sense of time, that the child has lived in a stable home environment;

d. the ability and willingness of each person applying for custody of the child to provide the child with guidance, education, the necessaries of life and any special needs of the child;

e. any plans proposed for the care and upbringing of the child;

f. the permanence and stability of the family unit with which it is proposed that the child will live.

63. These two members have deliberately omitted a subsection that would restrict mobility of the custodial parent. The Law Society representative is opposed to any restriction on mobility for a person seeking custody. It is recognized that this is the way case law is developing in some jurisdictions. The Department of Justice representative recognises that most custodial parents are women and that a mobility restriction has a negative impact on the custodial parent whose standard of living is often lower. If economic factors, or career advancement, require a move then it is the Department of Justice member's opinion that mobility should not be a factor in deciding custody. However, she **recommends** that where it appears that the primary purpose of the move is to discourage access, then due to the excessive costs of travel within and out of the NWT, it should be a factor.

64. **We do not recommend** a mobility provision similar to that found in the *Divorce Act*. This clause requires the custodial person to be willing to facilitate maximum contact for the access parent as a condition to granting custody. The trend in the developing case law in the country at present recognizes mobility of the custodial parent may be necessary. Only moves that are intended to thwart the access provisions of an order should be something that the tribunal can consider.

65. The Metis Nation representative had concerns that both the best interests checklist and the primary caretaker checklist may be culturally weighted. She feels that any checklist should be culturally neutral. She does not want the views on formal education of those raised in residential school to play against them in a custody decision.

66. The member for the Dene Nation and the Native Women's Association of the NWT **recommends** that there should be a statement of joint rights and responsibilities of the parents. She supports imposition of joint custody on parents if it is not detrimental to the child or if it is in the child's best interests.

67. **We recommend** that certain factors be proscribed because they are not relevant to the child's best interest or in awarding custody and that they should be set out in the legislation. The proscribed factors are gender and wealth. The majority of Working Group members also felt that sexual orientation should also be a proscribed factor.

68. **We recommend** that a factor that should be considered relevant to the test to determine who should obtain custody is domestic violence. Legislation should direct the tribunal to take into account the fact that a person has at some time committed violence against his/her spouse or child, or another member of the person's household. The Working Group feels that a statement must be made about violence and that violent behaviour will be considered by the tribunal when determining who should have custody of a child.

69. **We recommend** that the rights and responsibilities that flow from custody and access should be set out in the legislation. This is a priority with the member for the Dene

Nation and Native Women's Association of the NWT. Parents need to understand that they share the responsibility of parenting.

Access

70. **We recommend** that a test be developed to determine access, based on factors relevant to access, from the test used to determine custody.

71. **We recommend** that a statement be made that more than one person can have access to a child.

72. **We recommend** that the same proscriptions apply to awarding access as to awarding custody and **we recommend** that the same factors that a tribunal has to consider when awarding custody have to be considered by a tribunal when awarding access.

73. **We recommend** that a tribunal have power to direct supervision of custody or access to a child if a person consents to so act. **We recommend**, however, that the person directed to supervise would have to consent prior to acting in that capacity.

74. **We recommend** that the same report that may be required in custody determinations be available for the tribunal in access determinations.

Enforcement

75. **We recommend** using the Custody Enforcement Office for the purpose of enforcing access. Enforcements would be at the option of the office. We would prefer to see a less intrusive role played in access enforcement, such as mediation, rather than apprehending a child or going to court. We do not recommend apprehending a child in the case of access enforcement unless there is a serious concern that the child will be removed from the jurisdiction for the purpose of preventing access.

76. **We recommend** that the Custody Enforcement Office have the power to assist where it chooses to do so, in enforcing access orders from other jurisdictions. The decision would rest with the Director overseeing the program.

77. **We recommend** that notwithstanding any access or custody enforcement programs, individual parties should still be allowed to have the option of applying to the court for a Contempt of Court order if one party is not complying with or frustrating the enjoyment of an access order.

78. We recognize the child's right to support as being separate from the right to access. We do not recommend allowing the tribunal to reduce or extinguish child support if access is being wrongfully denied to a non-custodial parent. We do, however, recom-

mend that where a tribunal has made an order, then all courts should enforce that order and should not vary it unless there are material changes in circumstances.

79. **We recommend** that there be amendments to the *Maintenance Orders Enforcement Act* to facilitate collection of money from debtor spouses. Ontario has recently passed legislation which requires support payments to be deducted at source in the same way income tax deductions are made. At least one member of the Working Group is opposed to this because some spouses are compliant and do not have to have enforcement proceedings taken against them. However, we recommend that this be examined as a possibility for reducing the time of the Maintenance Enforcement Administrator so that he/she will have more time for more difficult cases and to assume the new responsibilities for custody and access enforcement.

80. **We recommend** an amendment to the *Maintenance Orders Enforcement Act* that allows reciprocal Territorial/Provincial garnishments. This is presently in the uniform legislation and it is useful to allow process against debtors who have assets in several jurisdictions.

81. **We recommend** amendments to the *Maintenance Orders Enforcement Act* that allow the Administrator to garnishee up to three years of arrears.

82. **We recommend** that in enforcement proceedings, the court be given jurisdiction to make interim orders. We also recommend that the legislation clarify that the Territorial Court can not vary an order of a federally appointed Judge.

83. **We recommend** that there be appropriate amendments to the Maintenance Enforcement legislation to allow domestic contracts to be registered with the court and to be confirmed as court orders. This would require an amendment, as well, to the *Maintenance Orders Facilities for Enforcement Act*. We also recommend an expanded definition of maintenance order once the new support legislation for spouses and children comes into effect.

84. **We recommend** that the *Maintenance Orders Enforcement Act* provide that if an individual is apprehended, he/she is to be brought before a Justice of the Peace within 48 hours to deal with his/her detention. We also recommend in the *Maintenance Orders Facilities for Enforcement Act*, deleting the requirement that a statement of grounds be produced. The Maintenance Enforcement Administrator reports that other jurisdictions do not require this and that it merely causes delay.

CHAPTER 5:
CHILD SUPPORT

Introduction

The Working Group is pleased to report that where the care, custody and support of children are involved, we have unanimous agreement on how this issue should be dealt with in legislation. There was consensus that rather than focusing on the rights of each parent in relation to their children, the primary right is that of the child, to receive support from both parents. There ought to be no distinction whether or not the parents are married, live common-law, or are not living together. Non-custodial aboriginal parents may not provide financial support but must give in kind support if financial assistance is not provided.

The child support chapter produced by Kate Murray and edited by Elaine Keenan Bengts, contained in Appendix I, has the unanimous support of the Working Group. The Working Group recommends that this paper be a background document to these recommendations.

The Working Group recognizes that under the present legislation in the Northwest Territories as well as throughout the country, there is a lack of clear principles to give a tribunal guidance in assessing maintenance amounts. The problem exists in the support sections of the *Divorce Act*, which is a national piece of legislation. Across Canada, family law practitioners, maintenance enforcement programs, and parties who have been to court, report that awards are inconsistent and uncertain.

The Working Group shares the perception with the Federal/Provincial/Territorial Family Law Committee and the National Family Law Section of the Canadian Bar Association that child support awards are too low and do not adequately share the burden of raising a child between a custodial and non-custodial parent. The high degree of uncertainty in determining child support awards results in increased litigation which is costly to parties who often cannot afford the litigation. It is obvious that this money would be better spent on the support of children. In order to avoid expensive protracted proceedings that they cannot afford, custodial parents often settle for low awards.

In proposing these child support guidelines, the Working Group recognizes that although this is not a solution to child poverty, particularly in cases where both parents live in impoverished circumstances, or where there is insufficient income between the mother and father for two households, guidelines should help to reduce child poverty in cases where the income of the payer spouse is sufficient to meet the actual costs to the custodial parent of raising their children. It should also reduce the wide margin that exists today between the standard of living of the custodial parent and children and the non-custodial parent.

In summary, based upon the results of studies in Alberta and British Columbia, as well as the U.S. and Australia that suggest that judges seem to arrive at amounts for child support which are neither related to the payer spouse's ability to pay, nor to the actual needs and expenses of raising a child, the Working Group strongly recommends limiting judicial discretion and standardizing the amount payable for child support based upon the family's ability to pay.

Recommendations

85. **We recommend** that the following principles should constitute the foundation for the guideline chosen:

    a. Both parents share equal legal responsibility for supporting their natural or adopted children. The economic responsibility should be divided in proportion to their available income.

    b. Adequate support should be available to all natural or adopted children of a given parent. "Adequate support" in a marriage breakdown context, means that children should suffer the least economic hardship possible. They should be entitled to enjoy a standard of living which is as close to the original pre-dissolution level as possible and to share the benefits of any improved standard of living enjoyed by either parent after the marriage ends.

    c. Child support legislation should easily allow parties to determine amounts which are objectively ascertainable, consistent, and predictable.

    d. Legislation should ensure flexibility to account for a variety of circumstances.

    e. Guidelines should be understandable and inexpensive to administer.

    All Working Group members agreed that natural and adoptive parents have a primary responsibility for the support of their children.

86. **We recommend** for Dene, Metis and non-aboriginal people that the legislation show that persons who have treated a child as part of their family while the parents co-habited, (in *loco parentis*) have an obligation to support the child. To non-aboriginal people this may be a secondary obligation which should supplement and not displace a natural or adoptive parent's primary obligation. The Metis see that there should be no distinction, however, they do agree that it should be determined on a case by case basis depending upon the relationship of the partners to the children. Therefore, there is not much disagreement between the Dene, Metis and non-aboriginal people on the recommendation for in loco parentis situations. The only exception to a natural parent's

responsibility would be in a case where the in loco parentis parent actively discouraged the natural parent's financial contribution for a lengthy time.

87. **We recommend** that obligations toward a child to whom one is in loco-parentis should not reduce or displace that parent's obligation towards his/her own natural or adoptive child.

88. **We recommend** for the Inuit and Inuvialuit that provision be made that a parent who is in *loco parentis* to a child is not obligated to support that child. Inuit and Inuvialuit see the responsibility for children remaining with the supporting family members of the natural or adoptive parent. The representative of the Law Society sees some difficulties in absolving a parent who is in loco parentis to a child from financial responsibility based solely on his or her racial background.

89. **We recommend** that for child support guidelines the legislation should be guided by the following five principles:

    a. Each natural or adopted child of a given parent should have an equal right to share in that parent's income, subject to factors such as the age of the child, the income of each parent and the income of current spouses.

    b. Each child is entitled to support without regard to the marital status of the parents at the time of the child's birth. Therefore, any guideline established would be equally applicable to paternity determinations.

    c. Application of a guideline should be sexually non-discriminatory.

    d. Insofar as possible, application of the guideline should not create a disincentive for either the custodial or non-custodial parent (or their current spouses, if applicable) to participate in the labour force.

    e. The guideline should be simple, flexible and efficient. A guideline should be given the status of a rebuttable presumption, with any deviation requiring a written finding stated on the record that application of the guideline would cause serious hardship or inequity.

90. **We recommend** that there be legislative provision for tribunals to order non-monetary support where appropriate.

91. **We recommend** that a variation of the Delaware-Melson formula, which is in the materials provided, should be examined as an option for a guideline formula to establish child support guidelines. It has the advantage of taking both income and the costs of raising a child into account. The purpose will be to provide predictability and consistency in the awarding of child support.

92. **We recommend** that statistical data be made available to provide appropriate guidelines for the Northwest Territories.

93. **We recommend** that the formula be examined to ensure that a standard of living allowance can be developed which would allow greater equalization of the standards of living of the two households after separation, as a modification of the existing Delaware-Melson formula. It must ensure that the children will share in any increase in the standard of living of either parent, based on parental income.

94. **We recommend** that the provision dealing with optional supplemental quarterly child support should be tailored to achieve the same result by reference to both the income and non-income assets of each parent.

95. **We recommend** that the Cassetty and Douthitt technique (described in the chapter on child support) be utilized to assess the equity of child support awards by calculation of the relative economic positions of the two households involved in a child support decision. A standardized base on which to compare the incomes of the two households must be selected. An example of this could be poverty income guidelines. Calculations of income poverty ratios allow for an assessment of the income-in-relation-to need of the two separate households.

96. **We recommend** that tribunals should be required to go through this exercise with respect to both the income and non-income assets of each parent in order to assess the equity of the child support orders when considering whether deviation from the guideline is appropriate or whether an optional supplementary child support award should be made.

97. **We recommend** that the following factors be considered in assessing child support guidelines:

    a. Income Base
    b. Attributed Income
    c. Self-support Reserve
    d. Support Obligations for Other Dependants
    e. Income of Current Spouses
    f. Custodial Parent's Income
    g. Age of Children
    h. Costs of Shared or Joint Parenting and Substantial Access
    i. Costs of Split Custody
    j. Child Care, Educational, Medical and other Extraordinary Expenses
    k. Geographic Variations

98. **We recommend** that the income base available for child support should be based on a modified definition of taxable income. The income base should be as broad as possible,

with deductions for expenditures or liabilities incurred to derive the income, more narrow than for income tax purposes.

99. **We recommend** that non-income earning activities, such as hunting and fishing, should be given a monetary value based on replacement costs or the costs of substituting food of a similar nutritional value in the community concerned and should be included in income.

100. **We recommend** the use of gross income in the child support formula. This reduces the opportunity for manipulation by way of deductions. This is also consistent with the view that payments of child support are a primary obligation, similar to the obligation to pay taxes.

101. **We recommend** that for a spouse who is voluntarily unemployed or under-employed, notional income be attributed to that person in light of their employment history, earning capacity, prevailing job opportunities, and earning levels in the community.

102. **We recommend** that if a parent or spouse is unemployed or not fully employed because he/she has undertaken child care responsibility, the value of those child care functions should be taken into account and deducted from any income attributed according to earning capacity. This is subject to the caveat that the unemployment or the under-employment is in the best interests of the children. This should not be construed to force a stay-home parent back to work. If the family dynamic included a stay at home parent before the breakup of the family, there should be no legislated mandate for a court to send that parent back to work simply because of the marriage breakdown.

103. **We recommend** that a self-support reserve to the non-custodial parent, below which only minimum child support may be ordered, be allowed as an attempt to ensure that there is no disincentive to work, however, it should be set close to poverty level and should apply to the incomes of both the custodial and non-custodial parents or households. The self support reserve is allowed in most guidelines.

104. **We recommend** that where there is the presence of a subsequent cohabitee or a spouse, that he/she be considered to reduce a parent's self-support level to account for economies of scale and reduced living expenses where the cohabitee or current spouse is employed but not, under any circumstances, to increase the self-support reserve.

105. **We recommend** that a support award for a child should consider all other support responsibilities of a parent for his/her other natural or adopted children. Each child entitled to support should share equally in his/her parent's resources, subject to the variations required by such factors as the age of the child, the income of each parent and the income of current spouses. To this extent, we disagree with the approach taken under the Delaware-Melson formula.

106. In keeping with the recommendations of the aboriginal researchers and their reports, **we recommend** that the obligation of step-parents and other persons who stand in loco parentis to children should be secondary. Responsibility should supplement, and not displace, a natural or adoptive parent's primary obligation to his/her children unless the circumstances of the case clearly merit such a conclusion. An example would be where a step-parent has actively discouraged the natural parent's financial contribution or where the step-parent-child relationship has been clearly established for a considerable period of time. Another example is where the natural or adoptive parent is dead or where the step-parent has obtained a custody order.

107. **We recommend** for Inuit and Inuvialuit that there be flexibility in the legislation to allow for no responsibility to support step children or children from a previous union who have lived with the adult in a family relationship.

108. **We recommend** that to the extent any improvement in the standard of living of a subsequent household is explicitly due to the income of a current spouse, it should be discounted. We recommend that a self-support reserve be built into the guidelines. However, the presence of a current spouse can impact on the quantum of the self-support reserve. He or she can reduce the self support reserve of the support paying parent if living expenses are borne by the current spouse thereby increasing the standard of living for the subsequent household.

109. **We recommend** that in order to accurately and equitably assess the responsibility of both parents to contribute to child support, the income of both parents should be considered. It is inappropriate to disregard the custodial parent's income. The emphasis is to ensure that the standards of living of the two new households are similar.

110. **We recommend** that the guidelines incorporate age adjustment factors which take the increased expenses associated with age into account.

111. Subject to recommendation 118, **we recommend** that non-custodial parents have an obligation to pay child maintenance until the child reaches age eighteen, or longer if the child remains a dependant by being a full-time student or for some other legitimate reason.

112. Parent(s) should support a child until the child reaches the age of 18, or 16 if the child leaves the control of the parent voluntarily.

Joint Custody/Substantial Access

113. **We recommend** that for joint physical custody arrangements or in cases where substantial access is exercised (which should be defined at a minimum as a child spending 35% or more of its time with the non-custodial parent), in the Northwest Territories this should be identified and taken into account before any adjustment

downward based on the proportions of time the child spends with either parent is considered. This is based upon the recognised principle that where parenting is shared, the total expenditures on behalf of children increase. As a result, there is an increase in the total expenditures for a child. This increases each parent's proportional share of the total costs that apply in a sole custody situation.

114. **We further recommend** in such cases that the nature of each parent's child related expenditure obligations should be clarified, in the order or agreement, to ensure that the child's real needs, such as clothing, education, and medical costs, are shared proportionately by the parents. There should be no adjustment in joint legal custody situations, where physical custody or substantial access are not involved.

Split Custody

115. **We recommend** in split custody situations where each parent has physical custody of at least one child, the guidelines should not leave each parent with an exclusive responsibility for meeting the financial costs of raising the child in his/her care. Rather, it should take into account the shared costs in light of the different parental incomes.

Extraordinary Expenses

116. **We recommend** that extraordinary expenses such as education, child care, medical or dental, should be pro-rated between the parents in proportion to their incomes and added to the basic child support obligation generated by the underlying guideline formula, subject to ensuring that the goal of the self-support reserve is not undermined.

117. **We recommend** that in joint custody and substantial access situations, the obligation should be pro-rated to the extent that both parents have the financial ability to contribute. Provision for extraordinary medical expenses should encompass all types of medical, dental and related professional care. Extraordinary educational expenses could include college, private schools, extra lessons, and special education programs for the needs of disabled children.

118. For the purpose of financial support for higher education past the child's minority, **we recommend** that the tribunals consider the family circumstances before ordering that education expenses be shared or pro-rated between the spouses rather than doing so automatically. The basis for this requirement is that there is no legal obligation on married parents to provide for the education of their children beyond majority. However, there is a need to encourage children in the NWT to seek higher education so the option should be there. Only the extraordinary educational expenses of disabled children should be allocated between the parents automatically as should child care and medical expenses.

119. **We recommend** that the Government of the Northwest Territories make available statistics to assess whether there are geographic variations in child rearing expenditures as a proportion of income. This should then be accommodated in the guidelines.

Guidelines

120. **We recommend** that legislation provide for a periodic reapplication of the prescribed guidelines in order to take into account changes in the age of children, remarriage with more dependents, illness of a child, or a major career improvement by one of the parties. While the effect of inflation may be dealt with by a cost of living indexation formula, such a formula is not sensitive to those cases where a non-custodial parent's income has not kept pace with inflation. Significant changes in other circumstances may have greater relevance for the quantum of assessment on the inflation rate. The existence of these guidelines should encourage parties to implement their own updating provisions.

121. **We recommend** that the guidelines be periodically reviewed to ensure they are up to date. Where guidelines involve fixed dollar amounts, such as self-support reserves, they are affected by inflation.

122. **We recommend** that income be reported and verified accurately under guidelines that focus on income. Parties should be required, under legislation, to exchange income and asset statements with documentation including income tax returns. For the purpose of updating child support assessments, exchange of financial information for this purpose should also be required.

123. **We recommend** that legislation require the tribunal to take into account the effects of the *Income Tax Act* on periodic support payments for a spouse or children.

124. **We recommend** that once the after tax cost of an award to the non-custodial parent and the after-tax benefit to the custodial parent are calculated, a pre-tax award should be adjusted in such a way as to offset the tax effect on the original award. This would apply as well to extraordinary child care expenses.

125. **We recommend** that the guidelines should be given the status of a rebuttable presumption, with any deviation requiring a written finding based on the record, that application of the guidelines would cause serious hardship or inequity.

126. **We recommend** that the guidelines should be used by the tribunals to review the adequacy of negotiated child support settlements.

127. **We recommend** that the guidelines should be binding upon the tribunal.

128. **We recommend** that the guidelines should be incorporated into legislation that can be revised easily and regularly.

129. **We also recommend** the consideration of the possibility of delegating the application of the guideline to an agency constituted to handle child support.

130. **We recommend** adopting the variation of the Delaware-Melson formula which takes into account costs and income, for a guideline. In addition, because Courts have tended to interpret guidelines as setting a maximum rather than a minimum obligation, the formula must ensure a standard of living allowance which would allow greater equalization of the standards of living of the two post-dissolution households and should ensure children a share in any increase in the standard of living of either parent based on parental income. Furthermore, it is crucial to the successful implementation of any guidelines that the data used to develop the formulae are relevant to the cost of living in the North, including the cost of travel. In addition, the optional supplemental quarterly child support provision should be tailored to achieve the same result by reference to both the income and non-income assets of each parent.

131. **We recommend** that when considering whether deviation from the guideline is appropriate, or whether an optional supplementary child support award should be made, tribunals should be required to assess the equity of child support awards, by calculation of the relative economic positions of the two households involved in a child support decision, with respect to both the income and non-income assets of each parent, by reference to poverty-income guidelines, or some other appropriate standard.

CHAPTER 6: ADOPTION

Introduction

The Working Group is in basic agreement with the paper produced by the contractor on adoption, reproduced in Appendix I. However, the recommendations that appear in this recommendation document will have priority if they conflict with any recommendations in the contractor's paper.

Adoption was a primary concern to all Working Group members. All Working Group members were concerned with the informal process that is taking place in the Northwest Territories whereby aboriginal children are being adopted outside the Northwest Territories without any screening by any agency that is accountable through the legislative process. There is also serious concern about aboriginal children being adopted to non-aboriginal people particularly if there is no allowance for a child to maintain contact with his/her cultural and spiritual heritage with aboriginal people in the Northwest Territories.

It should be noted that statistics for adoptions in the Northwest Territories demonstrate that there is a trend away from departmental placement of children and towards placement by individuals, through private and native custom adoption.

The following chart indicates the accurate adoption statistics for the Northwest Territories.

	DEPARTMENTAL ADOPTION	PRIVATE ADOPTION		NATIVE CUSTOM ADOPTION
		ABORIGINAL	NON-ABORIGINAL*	
1987	8	25	12	52
1988	7	22	10	77
1989	12	15	13	130
1990	3	21	9	55
1991	3	15	8	(approx) 50

*Aboriginal Children in non-aboriginal homes.

Please note that these statistics do not actually represent placements for a year because adoptions are processed six months to a year after placement. At present, the departmental priorities for placement of aboriginal children that are to be placed for adoption are:

a. With family first. Grandparents are consulted and their consent obtained before a child is adopted outside the family.

b. If an aboriginal child cannot be adopted by the family or extended family, then an aboriginal home with a similar cultural and aboriginal background is sought.

c. If none are available, only then is the child placed with the first approved family on the Adoptive Parents List that is with the department. These are homes that have been investigated and approved for placements.

The Working Group encourages communities/regions to assume responsibility for family and children's services. Where that occurs, responsibilities of the Department which are referred to in the following recommendations, become the responsibility of the community/region.

Recommendations

Native Custom Adoption

132. **We recommend** that Native custom adoption practices should not be legislated and should continue as they have in the past. Aboriginal people should be encouraged to return to the practice that existed in the past whereby responsible people within the community reviewed the adoption placement and approved it. This process ensured that the child was placed in a safe and loving environment. To continue this practice would avoid involvement by the Department of Social Services at a later date if the child is placed with a family where he/she could become in need of protection due to child abuse or neglect concerns.

133. **We recommend** that each community/region should continue to allow adoptions according to custom. Aboriginal people are very concerned about the welfare and cultural retention of the child and, for the Dene/Metis of the Western Arctic, the mother is very much a part of the decision making process. However, the decision is not her sole responsibility. **We recommend** that the decision on placement of a child should be done in consultation with the mother's extended family. This is consistent with the requirement of a review and approval by someone in the community/region. The representative of the Law Society disagrees with these recommendations.

134. **We recommend** that native custom adoptions should no longer be submitted to the Courts for a declaratory order stating when the adoption took place. **We recommend** that the Aboriginal Justice Council in each community/ region should affirm these adoptions by an order issued by them. These orders that are issued by the Aboriginal Justice Council should be sufficient to meet the requirements of the *Vital Statistics Act* and the *Change of Name Act*. These statutes should be amended to require the Registrar to change the child's name and change whatever other records are changed when an adoption under the *Child Welfare Act* is processed in the office of Vital Statistics. An order from an Aboriginal Justice Council should be sufficient for a change of name under the *Change of Name Act*. The representative of the Law Society raises the issue that by not submitting custom adoption for some sort of court recognition, there may be difficulties when other jurisdictions refuse to recognize such arrangements.

135. **We recommend** that an Aboriginal Justice Council should be allowed to impose limitations on custom adoption when a child is to be adopted outside the jurisdiction. This would be a decision made within the community/region.

Adoption Legislation

For the purpose of this section, a private adoption is defined as where the mother wants to play an active role in determining where a child should be placed. A non-private adoption, formerly a departmental adoption, is defined as one where the mother does not want to have input into the placement of the child.

136 .**We recommend** that the legislation be flexible enough to recognize that there are three types of adoption under the legislative scheme in addition to Native custom adoption. These are:

a. Third Party Adoptions, where the parents give the child to people outside the family,

b. Step-Parent Adoptions, and

c. Departmental Adoptions, where the child has been committed to the permanent care and custody of the Superintendent of Child Welfare.

Because the second largest number of adoptions after Native custom adoptions are private adoptions and because many of these are to step-parents, legislation should be sufficiently flexible to accommodate a variety of post-adoption relationships. This includes continuing the legal relationship with the birth parents and birth family. This will reflect all types of social reality, provide for the needs of all children, and maximize their best interests.

137. All non-private, departmental adoptions shall be administered by an agency falling under the jurisdiction of the Department of Social Services.

138. Subject to recommendation 139, **we recommend** that a child's written consent to adoption of any type should be required where the child is ten years of age or older.

139. **We recommend** that the child's consent can be dispensed with only when the tribunal is satisfied that obtaining the consent would cause the child emotional harm or that the child is not able to consent because of a disability.

140. **We recommend** the use of an independent advocate (such as the amicus curiae or advocate with the Department of Justice) to investigate the likelihood of emotional harm from the child's perspective. Only if the advocate feels it is necessary should emotional harm have to be demonstrated by expert medical evidence.

141. **We recommend** that an adoption order should only be made with the written consent of the child's parents or, in the case of non-private adoptions, the responsible representative under the legislation.

    Parent, for consent purposes, would include the following:

    a. a child's mother,

    b. a person who is presumed to be the father of the child unless it is proved to be otherwise,

    c. an individual having lawful custody of the child,

    d. a person who during the twelve months preceding placement for adoption has demonstrated a settled intention to treat the child as a child of his or her family or has acknowledged parentage and provided support,

    e. a person who under an agreement or Court order is required to provide for the child, has custody of, or a right of access to the child, or

    f. a person who has acknowledged parenting in writing.

    Definitions should not include a licensee or a foster parent.

142. **We recommend** parental consent to adoption should be dispensed with if the person demonstrates an intent to forego parental rights and obligations, has received notice of the proposed adoption and of the application to dispense with consent, or a reasonable effort to give the notice has been made and the person has not attempted to rebut the presumption of intent, or otherwise cannot reasonably be located.

143. **We recommend** the following factors should be presumed to constitute intention to forego parental rights:

    a. failure to communicate with or visit the child or a child's custodian for a period of a year, or

    b. in the case of a newborn, failure to communicate with or visit the child's mother for a period of six months immediately before or after the child's birth.

    Any Court order dispensing with consent should be made in the best interests of the child.

144. **We recommend** that the Department of Social Services should either provide or arrange for counselling to all parents who consent to adoption of their child. Independent legal advice should be arranged for all such parents prior to the giving of consent. This could be part of the role of the Department of Justice advocate. Where the parent is under the age of majority, both the counselling and independent legal advice should be required and the independent legal advisor should certify that the consent is fully informed and reflects the person's wishes.

145. **We recommend** that upon verification of counselling and independent legal advice, a person under the age of majority can consent. An integral part of ensuring a valid consent is the provision of translation services.

146. **We recommend** counselling for single parents or young parents who indicate they want to surrender their child. The counsellor should make them aware of other alternatives. **We recommend** that the mother be fully advised of programs that are available including financial support, family education programs, and daycare to enable the mother to continue her education and/or work if she keeps her child.

147. **We recommend** that adequate time must be provided to the birth mother before she consents to the adoption and before the consent becomes irrevocable. **We recommend** that these periods be ten and thirty days respectively.

148. **We recommend** that a couple need not be married in order to adopt a child.

149. **We also recommend** that for step-parent adoptions, the natural parent of the child should not have to adopt the child in order for the step-parent to adopt. The legislation should make it clear that the natural custodial parent, who consents to the adoption by the step-parent, still retains his/her parental rights when consent is given.

Private Adoption

Introduction

The Working Group was unanimous in their concerns about placement of aboriginal children outside the Northwest Territories. In addition, there is a serious concern about the placement of aboriginal children outside of their extended family and community. The Metis, Dene, Inuvialuit and Inuit were all concerned that the child know his or her cultural background so that the child will not develop cultural identity problems when he/she becomes a teenager.

150. Therefore, **the Working Group**, except for Elaine Keenan-Bengts **recommends** for the placement of children outside the jurisdiction, that it should only be allowed upon the permission of the agency and a clear policy needs to be developed to direct how the agency should exercise the discretion to consent to placements outside the jurisdiction. It is anticipated by the Working Group members that the only children who would be placed outside the Northwest Territories would be those with severe medical problems that require monitoring or institutionalization with advanced medical centres that are only located in southern jurisdictions. In those cases, the Department of Social Services or agency would have continued involvement because even if the child is adopted, it will probably be a subsidized adoption to assist the family with the expensive medical treatment.

151. Restrictions to placement outside the Northwest Territories should not apply to step-parent or family adoptions. **We recommend** the following priorities should be legislated for the placement of Dene, Metis and aboriginal children.

    a. Placement with members of the child's extended family or household, resident in the community;

    b. Placement with members of the child's kinship group resident in the community;

    c. Placement in an aboriginal setting within the child's community;

    d. Placement with members of the child's extended family or household outside the community;

    e. Placement with members of the child's kinship group outside the community;

    f. Placement within a non-aboriginal setting in the child's community;

    g. Placement within a non-aboriginal setting outside the child's community.

152. In Inuit and Inuvialuit communities, the first priority of placement for aboriginal people is placement with the spouse if he/she is not residing in the same household but

residing within the same community. The second priority would be placement with members of the child's extended family or household, resident in the community. It is not necessary to identify kinship as a priority as this would be redundant. Priorities c to g, inclusive, set out in preceding paragraphs, would apply in the same order, thereafter.

153. **We recommend** that the only time placement would not follow the progression of these priorities would be under exceptional circumstances such as severe medical problems, fetal alcohol syndrome children, (both of which cause significant expenses to a family) or when all parties are in agreement that it should not apply in that order.

154. **We recommend** that the child should, if old enough, be part of the decision-making process.

155. **We recommend** that this priority list be followed by the Department of Social Services for the placement of aboriginal children in the Department's care, outside of aboriginal communities. This would apply for the transitional phase until the community/region assumes the mandate for the delivery of social services and/or establishes its own codes for the Aboriginal Justice Councils.

156. All four aboriginal Working Group members and two non-aboriginal Working Group members **recommend** that there be no private unscreened placements for adoption or adoptions allowed in the Northwest Territories. All placements would have to be through the Agency for private adoptions that are to be done in consultation with the mother or for those adoptions where the mother wants no input into placement of the child. This would not apply to family adoptions or step-parent adoptions. This restriction would prohibit any person, including a birth parent, from placing a child for adoption, except through the Agency. If the parent(s) want to be involved, their placement wishes will be respected unless the home is determined to be unsuitable. We repeat the concerns about well-meaning professionals in the Northwest Territories who are facilitating third-party adoptions, some of which are outside the Northwest Territories, without any scrutiny by any agency.

157. We recognize that some parents in the Northwest Territories want to be involved in the placement of their children and to prohibit this could drive these placements/adoptions underground. We therefore **recommend** that private adoptions be allowed in the Northwest Territories by way of the agency and that parents' choices be respected. **We recommend** that there should be careful scrutiny of any placement outside the Northwest Territories similar to that which is proposed in the Hague Convention on international adoption.

158. **We recommend** pre-birth counselling for all women who are considering giving their child up for adoption and, particularly, for aboriginal women.

159. **We recommend** that the counselling for aboriginal women be provided where possible by an aboriginal woman from a similar aboriginal background.

160. **We recommend** that the Department of Social Services should be required to arrange for pre-birth counselling and that the Department of Justice should be required to arrange for the independent legal advice and that an independent legal advisor be provided for parents under the age of majority who will certify that the consent is fully informed and reflects the person's true wishes.

161. **We recommend** that before the tribunal grants an order for adoption, it must be satisfied that the adoptive parents are capable and willing to assume the responsibility of parents towards the child, and have demonstrated an understanding and appreciation of the role of parents of a child not born to them. The tribunal must also be satisfied that the adoption is in the best interests of the child and will promote the child's well-being.

162. **We recommend** that factors such as age and family income of adoptive parents should not preclude adoption.

163. **We recommend** that where financial assistance is required by a family that is the best adoptive placement and, in particular, would provide cultural continuity, then adoption subsidies should be available.

164. **We recommend** that for step-parent adoptions or adoptions by relatives, placements do not have to be through the agency of the Department of Social Services and prospective adoptive parents do not necessarily have to be subject to scrutiny that occurs in third-party adoptions. The tribunal should have the authority to order investigation of a step-parent or a relative involved in an adoption. Guidelines for the exercise of such discretion should be developed which includes investigation where there is a history of child abuse or a previous finding that a child of the proposed adoptive parent has been found in need of protection.

165. **We recommend** that in the case of step-parent adoptions where the non-custodial birth parent is not prepared to consent to the adoption and wishes to retain contact with the child in a supportive role, that such wishes should be respected. Therefore, **we recommend** an adoption order should not sever all rights between the non-custodial spouse and his/her natural child. In such cases non-custodial natural parents will have to recognize that rights of survivorship will remain in respect of an estate. This can be dealt with in the order. If it is not and if a will is not made, intestate succession law will apply. There may be exceptional cases where ties should be severed completely and the legislation should leave that option open. In disputed step-parent adoptions, the non-custodial spouse should be allowed to deal with the issue of access. **We recommend** that the tribunal have the power to allow access to continue after the adoption, as part of the order.

166. In the case of adoption due to the death of parents, there is no good reason to sever all ties to birth parents or birth family. **We recommend** that access to birth family, as well as preservation of the rights and obligations as between the adoptee and the birth family, be maintained.

167. **We recommend** that these "open adoptions" be considered for relative adoptions as well. On a case by case basis, the tribunal can consider whether access and/or inheritance should survive the adoption.

168. **We recommend** that the tribunal be given the option to turn an adoption application into a custody application. This provision is available in Yukon legislation.

169. The representative of the Law Society of the Northwest Territories **recommends** that private adoptions respecting the wishes of the birth parent should be allowed without involvement of an agency.

170. In the case of departmental adoptions, where a child has been removed from his or her parents and placed in the permanent care and custody of the Department of Social Services **we recommend** for older children or children who have ties to their previous family, that the court should have discretion to not sever bonds to the family and/or community except where evidence warrants that all ties should be severed due to the health, safety or welfare of the child. Access to the parents or family should be considered and the court should have the option to grant it.

171. **We recommend** that parents of children who have been committed permanently to the care and custody of the Department should be given full opportunity to complete the adoptive profile records for the use of the adoptee in later years and should also be entitled to be named in an adoption register and to know of that entitlement in cases where ties are severed.

Confidentiality in Adoption

172. Issues of confidentiality do not affect Native custom adoption and no confidentiality will be provided to the birth mother as native adoption is regulated by the community as a whole and the families concerned in particular. During the transition period, if private or departmental adoptions of Dene and Metis aboriginal children take place, **we recommend** that the mother can make application to have the records kept confidential but only for a period of time, preferably a period of five years. If at the end of the period she wishes to continue keeping the records confidential, she must re-apply. When the child reaches the age of sixteen, the records will no longer be classified as confidential and the child will be allowed access to all information. For Dene/Metis adoptees, this will apply retroactively.

173. We recommend that in the case of Inuit and Inuvialuit children, confidentiality may apply if the birth mother wishes. For Inuit and Inuvialuit, confidentiality issues will not be retroactive. It is assumed that the mother chose the option of adoption with the assurance of confidentiality and that should be respected. Records of past adoptions of children now over the age of sixteen will only be opened if both the birth mother and child agree that the exchange of information shall take place through the Department of Social Services.

174. **We recommend** the development of legislation for adoptions that are sealed, similar to the Ontario legislation, which gives a broader right of access to information without permission, on the grounds of health, safety or welfare. We would extend it to facilitate the establishment of aboriginal status as well.

175. **We recommend** that where the adoption is a third-party adoption or where the tribunal orders no continuing access, the following provisions should apply:

    a. Parties to the adoption process must be told, before the child is placed for adoption, of their right or the right of the adoptive child, to obtain non-identifying information, and to participate in a system of adoption disclosure.

    b. The Department of Social Services should be required to obtain a detailed profile and ensure that adoptive and birth parents be encouraged to keep the information updated.

    c. The release of non-identifying information should be a right.

    d. Identifying information should be available upon the consent of the parties concerned.

    e. Counselling should be available to both the birth parents and the adoptee before any reconciliation takes place.

176. **We recommend** that these should be a legislated responsibility with the Department of Social Services to set up and maintain an adoption registry.

177. **We recommend** that at the request of an adoptee, the Registrar should conduct a discreet search for birth parents and ascertain whether they wish to be named in the register, knowing that the adoptee wants the information or visa versa. **We recommend** that if a person places their name in the adoption register this would constitute consent to the release of identifying information.

178. **We recommend** that identifying information should be released without consent in circumstances where the child's health, safety, welfare or aboriginal status require it.

179. **We recommend** that counselling be available for persons who receive identifying information.

180. **We recommend** that the following parties should be entitled to request non-identifying information:

    a. The adoptive person, either when the person has reached the age of eighteen or with the written consent of an adoptive parent.

    b. An adoptive parent.

    c. A birth parent or birth grandparent.

    d. A birth sibling at age eighteen.

    e. A person who has the written consent of the adoptee or the adoptive parent if they are entitled to the information.

    f. Any other person if, in the Registrar's opinion, it is desirable that the person be able to request non-identifying information.

    The following parties should be entitled to apply and be named in the register for the release of identifying information:

    a. The adopted person at age eighteen.

    b. The birth parent or birth grandparent of the adoptee.

    c. The birth sibling or an adopted person, at age eighteen.

    d. Any other person if, in the Registrar's opinion, it is desirable that the person be named in the register as if he or she were the birth parent.

181. **We recommend** that where the agency is charged with determining the suitability of a person to be an adoptive parent and the agency indicates that the person is not suitable, that person should have the right to be notified of the objections and the right to reply to the objections. After this process has been completed, the determination as to suitability should be final.

182. **We recommend** that a person who has been found suitable as an adoptive parent should have no rights with respect to decisions concerning the placement of children other than with themselves. For example, if a person refuses a placement or the placement breaks down, that person has no rights over subsequent placements.

183. **We recommend** that a person with whom a child has been placed by the Department for adoption, should have the right to be notified of objections raised to the placement and be given the opportunity to reply to such objections. Once this procedure has been complied with, the child may be removed from the home of the adoptive parents. However, the adoptive parents should be entitled to have the decision to remove the child from the placement reviewed.

184. **We recommend** that the placement by anyone of a child in a home for adoption does not preclude child welfare legislation and the rights of the Department to apprehend a child. In this case, the adoptive parents would be entitled to the same notice as any other person entitled to notice under child welfare legislation.

185. **We recommend** very stiff fines of at least $10,000 and up to one year in jail for a first offence for anyone removing children from the jurisdiction for the purpose of adoption or placing children for adoption contrary to the Act. Subsequent penalties should be more severe.

186. At this point in time, the Working Group does not find it is necessary to recommend prohibition of foreign adoptions within the Northwest Territories. Therefore, **we recommend** that the legislation be worded such that consents from outside the Northwest Territories would be acceptable as long as they complied with the laws of the jurisdictions in which the parents of the child were resident when they gave the consent. However, we feel the Northwest Territories should be responsive to international concerns about trafficking in children and should consider the recommendations being developed under the Hague Convention on International Adoptions.

187. The Working Group **recommends** that care must be taken in drafting the legislation to prevent placement of children in an adoptive home during the period where a consent can be revoked. This creates hardship for the adoptive parents if the child is subsequently removed from them. Often custody battles arise. However, the Working Group feels very strongly that the biological parents should have this right. Therefore, it should be very clear in the legislation that placement should be avoided prior to that time and if there are placements, that this does not give the adoptive parents any rights until after the period for revoking consent has expired.

188. The Working Group **recommends** that an Affidavit of Execution be required for all consents.

CHAPTER 7: GUARDIANSHIP

189. **We recommend** that the recommendations of the contractors on guardianship be adopted. This chapter is included in Appendix I.

190. **We recommend** that in addition to the ability to appoint by will a guardian of any child, in respect of which a person has custody, for aboriginal people this should be respected if it is done verbally. Verification can be by way of witnesses who have heard the request of the deceased person.

191. The following recommendations for guardianship are accepted by the Working Group:

    a. "Guardianship" should be seen as a subset of custody and custodial rights, and should be conferred by appointment rather than by order of a tribunal.

    b. Guardianship would provide a legal framework for facilitating private arrangements to be made within families and communities for the care and upbringing of children, without unduly involving proceedings before tribunals or agency approvals.

    c. The person having legal custody should be expressly empowered to appoint a guardian either during their lifetime or by will, to exercise rights of custody in respect of a child's person and property.

    d. Different people may be appointed as guardians for the child and of the child's property.

    e. An appointment of guardianship should be revocable, and should be subordinate to any inconsistent judicial order or order of an Aboriginal Justice Council.

    f. Custodial and guardianship authority over the child's property should be enabling and facilitative, but should not affect rights the child may have under general contract law.

    g. A validating procedure involving the consent of the child, upon reaching a certain age, together with the approval of an independent advocate, court, or Aboriginal Justice Council (depending upon the amount), should apply with respect to the sale or encumbrance of the property of a child by a guardian or a person having custody of the child. All such transactions should be for the care, support, education or general benefit of the child.

h. A public authority that has undertaken the care and supervision of a child on a temporary or permanent basis under an order of a tribunal or agreement should have the authority to appoint guardians while the child is in care.

Amicus/Advocate

192. **We recommend** that the tribunal deciding a custody case have the authority to order and appoint a person who has the required skill or expertise to assess and report to the tribunal on the needs of the child, and the ability and willingness of the parties or any of them to satisfy the needs of the child.

193. **We recommend** that the Department of Justice assume responsibility for facilitating and having these reports completed. The Working Group recognizes that in many cases reports are very expensive and a cost of the preparation of the report shall be borne by the parties. It is assumed that if a party is funded by Legal Aid, then that person's share shall be paid by Legal Aid. The representative of the Law Society does not feel that costs of assessments should be borne by the parties where they cannot afford it.

194. **We recommend** that the Department of Justice should assume responsibility for having in place an amicus curiae or advocate to assist the tribunal in those cases where the tribunal deems that it is necessary.

195. **We recommend** that the Department of Justice consult with the Alberta amicus curiae program to look at cost-effectiveness. We recognize that costs can be reduced in many cases by hiring investigators who need not always be psychologists or physicians. We recognize that experts are not required except where certain circumstances warrant. This would be the exception and not the norm.

Tribunal Jurisdiction over a Child

196. **We recommend** that the legislation set out the jurisdiction of a tribunal to deal with custody and access to a child. A Northwest Territories tribunal would have jurisdiction over a child who is habitually resident in the Northwest Territories at the commencement of an application. The representative of the Law Society recommends that a Court of the Northwest Territories have jurisdiction over a child who is not habitually resident in the NWT, for the purpose of dealing with emergency situations.

197. **We recommend** that there be indication in the legislation that the removal or withholding of a child from a place where the child is habitually resident does not alter the habitual residence of the child.

Custody Enforcement

198. **We recommend** that there be a Custody Enforcement Office with the Maintenance Enforcement Office in the Northwest Territories and that powers be given to the Custody Enforcement Officer similar to those contained in the legislation in the Yukon.

199. **We recommend** that a tribunal have power to direct a Sheriff or Police Officer, if it is satisfied on reasonable and probable grounds that:

    a. a child is being withheld wrongfully from a person entitled to custody or access to a child, and there is no reasonable grounds for doing so, or

    b. that a person who is prohibited by the order of a tribunal or a separation agreement from removing the child from the Northwest Territories, proposes to remove the child, or

    c. that a person who is entitled to access, proposes to remove a child or have the child removed from the Northwest Territories without likelihood of returning the child to the Northwest Territories.

    to locate, apprehend and deliver the child in accordance with the order. The tribunal should have the power to make such an order without notice if it is satisfied that such an order should be made without delay. The representative of the Law Society does not believe a child's apprehension should be directed where that child is being withheld for good and reasonable grounds, such as apprehension of abuse.

200. **We recommend** that the Custody Enforcement Office would enforce custody orders made within the Northwest Territories as well as extra-territorial custody orders if the child becomes resident of the Territories. Centralization of the enforcement of all custody orders including international child abductions under the Hague Convention should be conducted from this office.

CHAPTER 8:
CHILDREN AND FAMILY SERVICES/ CHILD WELFARE

Introduction

We do not believe in using the words "child welfare" but recommend wording legislation so that it suggests that the role of government and interveners is to assist children and families.

Child Welfare/Social Services should be administered by communities. As discussed in Chapter I, child welfare would be a primary responsibility of the Aboriginal Justice Councils.

The Aboriginal Justice Councils should have the authority to make decisions not only for the best interest of the child but for the best interest of the immediate and extended family units. This includes setting out conditions that family members adhere to by agreement, in conjunction with other community agencies (such as alcohol counsellors, local housing authorities, health and education committees).

The representative of the Law Society and the representative of the Department of Justice feel that protection of the child should be the primary focus in child welfare matters and that the interests of the family and community should be considered secondarily.

Until community and/or regional councils are in place, the Department of Justice should ensure that the courts are able to handle child protection cases in a manner that demonstrates a sincere concern for the health, safety and well being of children and places these interests first.

NOTE: The recommendations of the original contractor contained in Appendix II, entitled "Recognition of Aboriginal Family Law" and "Child Welfare", are not accepted in their entirety by the Working Group. Therefore, the recommendations below and the chapter on Aboriginal Law in Appendix I should override the work of the original contractor where there is conflict. The chapter in Appendix II on child welfare, in particular, is not accepted by the Working Group. The process outlined in this chapter is far too complex and cumbersome for delivery of services in the Northwest Territories.

Recommendations

201. **We recommend** the basic philosophy which should be reflected by the legislation, practices and policy governing services for families and children, is:

    a. As a paramount objective, to promote the best interests, protection and well-being of children;

    b. To recognize that aboriginal people within their communities should be entitled to provide, wherever possible, their own child and family services and that all services to aboriginal children and families should be provided in a manner that recognizes their culture, heritage and traditions and the concept of extended family. This would apply even in cases where non-aboriginal adjudicators and the legislative model are being utilized in child protection cases.

    c. To recognize that communities and regions have the right to establish their own tribunals and participate directly in the adjudication of cases involving aboriginal children and, therefore, should be entitled to:

        i. establish evidentiary standards reflective of their culture, heritage and traditions, for application in proceedings involving aboriginal children;

        ii. establish procedures reflective of aboriginal methods of decision-making, for use in proceedings involving aboriginal children;

        iii. participate directly in the design, management and delivery of services for aboriginal children and families.

    d. To recognize that the institution of the family is different in some respects between aboriginal and non-aboriginal cultures and also among aboriginal cultures and, in order to ensure that GNWT legislation promotes equality and mutual respect:

        i. to identify within the legislation certain values which reflect both non-aboriginal law and customary law that are equally applicable to all families, and

        ii. to identify other aspects of the legislation which may not be equally applicable, and recognize in law that aboriginal groups or non-aboriginal groups may have the authority to apply alternative provisions or practices.

    e. To support children within the context of their family and extended family to the greatest extent possible, by providing voluntary assistance services.

f. To promote the protection and well-being of children in a way which, as far as possible, promotes family and community integrity and continuity.

g. Where assistance for children and families is either requested or required, to choose a type of service which will meet the needs of the child and will, as much as is possible in the circumstances, either cause the least amount of disruption to the family or promote the early reunification of the child with the family.

h. If involuntary intervention may be necessary or fundamental interests will be affected by a decision, to provide clear criteria for action, and procedural safeguards to define the respective roles, rights and responsibilities of the child, family, community, administrative and judicial decision makers.

i. To promote the planning and delivery of assistance and rehabilitative services at a community level.

j. To provide for periodic review of services and placements.

k. To express the legislation, practices and policy in plain language which will be understood by community members with no special training in law or social work.

Definitions

202. **We recommend** that there should be a definition of "best interests of the child" so that whenever the expression "best interests of the child" is used in the legislation, there can be reference to this definition. The definition should reflect the "Basic Principles" in Recommendation 211 and the considerations referred to in Recommendation 252(d).

We recommend that the legislation include the following proposed definitions.

Child

203. **We recommend** that the definition of "child" for child protection proceedings be a person actually or apparently under the age of sixteen. If there is an order with respect to a child who is near the age of sixteen a tribunal shall have the authority to decide that is would be in the best interests of the child to continue to apply the legislation to that child past the age of 16, up to and including the age of 18.

204. **We recommend** that for other purposes, where special needs are being provided on behalf of the child, the definition of child may be extended to the age of majority. Then there will be no gap in provision of service for an individual with special needs.

Agency

205. **We recommend** that the term "agency" be used to refer to any agency or person who has the authority under the legislation (or a community code) to provide assistance to families or to children who may be in need of protection. This may be the Department of Social Services, or a community agency, or a designated person or persons.

Family

206. **We recommend** that the definition of family be one or more adult persons:

    a. and one or more children who live with them and for whom they are the caregivers; and/or

    b. who live together and are each other's caregivers.

Extended Family

207. **We recommend** that the term "extended family" refer to a network of persons who are related to each other by birth, marriage, or by the sharing of the caregiver role with respect to dependents. In all cultures this includes parents, children, and grandparents. Beyond this, the definition varies according to cultural heritage and personal circumstances.

Parents

208. **We recommend** that:

    a. where the biological parent(s) are the adult person(s) who reside with the child and are the caregivers for the child, "parent" means the biological parent(s).

    b. Where (a) does not apply, parent(s) are the adult person(s) who reside with the child and are the caregivers for the child.

Advocate

209. **We recommend** that this term refers to someone who is knowledgeable about the child protection system and who can help someone to understand how the system works and how to make their wishes or questions known. This person could be a trained specialist, but could also be a more experienced member of the extended family or community.

210. **We recommend** that "special needs" be defined to mean a need that is related to, or caused by, a behavioural, developmental, emotional, physical, mental or other disability.

Community Codes

211. **We recommend** that the legislation should provide for Aboriginal Justice Councils to develop and apply their own policies and procedures. Community codes should not be set out in the legislation but it should recognize that custom law can vary from community to community and region to region. Certain principles or fundamental concepts or minimum standards may be identified within the legislation as being universally applicable. These would not be subject to modification by community code.

Basic Principles

212. **We recommend** that family and children's services legislation should contain a declaration of basic principles which reflect the general philosophy of the legislation, in order to provide guidance for family members as well as administrative and judicial decision makers. These principles would not have legal force by themselves, but would aid in interpreting the meaning of the legislation.

213. **We recommend** that the Aboriginal Justice Councils or other tribunals, and all persons that exercise authority or make decisions relating to a child who is in need of protection, pursuant to family and children's services legislation, must do so in the best interests of the child, and, in doing so, must consider the following principles:

    a. In the life of a child, the family is the most basic unit and the family's well-being should be supported and promoted;

    b. The family is responsible for the care and supervision of its children. If services are necessary to assist the family in providing for the care of a child, the services should:

        i. support, enhance and supplement the family wherever possible, so that the needs of the child can be met within the family/extended family;

        ii. be designed and provided in a way that meets a child's need for a continuous, stable environment and, where possible, that promotes the child's opportunity to be a wanted and needed member of the family, and to enjoy his or her family relationships;

        iii. take into account the cultural heritage of the child, and the physical, emotional and developmental differences among children.

c. Services for families and children are most effective when they are a response to a person's or family's own perceptions of its needs. They should be provided on a voluntary basis wherever possible. In cases of conflict between children and other family members, or among family members, due regard should be given to the concerns of each family member;

d. If either voluntary or involuntary intervention in the life of a child or family is in the child's best interests, the intervention to be chosen should be the one which will most effectively:

   i. meet the immediate needs of the child, and

   ii. assist the family/extended family, and, where appropriate, the community, to meet the needs of the child in the future;

e. Services, both preventive and rehabilitative, should be designed to alleviate or remedy the condition that caused the child or family to be in need of those services;

f. Services to children and families should draw upon community resources where possible and be designed and provided in a way that recognizes familial, cultural, linguistic, and religious background and heritage;

g. A child placed in care should be provided with a level of care that is adequate to meet his or her needs and is consistent with community standards and available resources;

h. A person or institution who assumes responsibility for the care of a child must be able and willing to make the child aware of and familiar with his or her familial, cultural, linguistic, and religious background and heritage, and must make every effort to do so;

i. There should be no unreasonable delay in making or implementing a decision affecting a child;

j. Adult family members and children should be given the opportunity to be heard and the right to have their opinions considered when decisions affecting their interests are being made. They have the right to ask questions about the provision of services. If it is not inconsistent with the protection of a child, advocates should be available to assist family members and children in making themselves heard in cases where serious decisions must be made;

k. All possible precautions must be taken to ensure that agreements placing children in care, are based upon informed consent. Particular regard must be given to linguistic and cultural factors which may influence the making of such agreements.

214. We recognize that planning and development of services is not a matter for legislation. **We have five recommendations** about the services that should be available to implement this legislation.

a. Each community should have access to services of three major types:

i. primary prevention - refers to efforts aimed at positively influencing parents and families before abuse or neglect occurs, e.g. prenatal programs, parenting assistance and parenting skills programs;

ii. secondary prevention - support services for persons and families who, because of their life situation, may be likely to develop problems, e.g. substance abuse programs, family counselling;

iii. treatment and rehabilitation - services offered to a family after a child has been found to be in need of protection, e.g. foster care, homemaker programs;

b. Each community should establish priorities and develop an action plan to maximize the value of existing resources, e.g. extended family, elders, spiritual leaders, community institutions and programs;

c. Coordination of services should be promoted, for example, by establishing local or regional children's services and coordinating committees;

d. Consideration should be given to making the creation, funding or availability of certain preventive services mandatory by legislation. This would ensure some allocation of resources for prevention and education, which is the necessary cornerstone of a positive child protection system. It is suggested that as a minimum each community should have a home assistance program and adequate foster home services;

e. There is a perceived difficulty at the community level between seeking counselling/advice about family issues from the same worker who administers the social assistance payment program. The Working Group recommends that these should be distinct functions if at all possible.

215. **We recommend** that there should be voluntary access to services.

216. **We recommend** that all temporary care agreements be written and describe the rights and obligations of all the parties involved.

217. Provision for entering into agreements involving children under the age of sixteen should be included in legislation. We are concerned that parents and children understand the contents of an agreement and the implications of signing it. The agency should ensure that translator and advocate services have been offered so that anyone signing a voluntary agreement for services understands what it means and what their rights are.

218. **We recommend** that there not be a temporary care agreement unless there is an appropriate residential placement or foster home and there is no other alternative course of action to assist the child in his or her own home. A policy that the child would remain within the community would apply, unless his or her needs cannot be accommodated there.

219. **We recommend** that agreements cannot exceed six months without review by a tribunal. Agreements can be extended for a further period of up to six months on review but no child shall be kept in care for a period exceeding 24 months by way of agreement, unless it is ordered by a tribunal having jurisdiction in the comunity of residence of the child.

220. **We recommend** that whenever an agreement is reviewed by a tribunal it should ensure that the spirit of the legislation is being met within the agreement.

221. **We recommend** that these agreements should allow for a transfer of consent to medical treatment where a parent's consent would otherwise be required, to be exercised only where the parents are not available to make the decision themselves.

222. **We recommend** that there be provision for special needs agreements up to the age of majority to allow for the society to provide services to meet a child's special needs and the society's supervision or care and custody of the child. We do not recommend that these agreements detract from responsibilities by other government agencies, such as the Department of Education to provide for the education of a child with special needs. These special needs agreements can be longer than two years. They should be reviewed by a tribunal every six months for two years and annually thereafter.

223. **We recommend** for both special needs agreements and temporary care agreements that consideration be given to the parents' ability to contribute towards the care of the child. If it is determined that the parent(s) have financial capability or can contribute in kind, then it is recommended that a contribution be incorporated into the agreement and that it can be enforced in the same manner as a maintenance order.

224. **We recommend** that for temporary care agreements where a child is 10 years of age or older, the child's consent is required, and the child should have an advocate provided to help him/her understand and express his/her concerns and wishes. If the child refuses to consent then the matter should be heard by the tribunal. It should be within the discretion of the tribunal to waive the child's consent after the child and his/her advocate have been heard and if it is in the child's best interests.

225. **We recommend** that there be provisions in the legislation so that either the parents or agency can terminate the agreement upon 5 days notice, thereby causing the child to be returned to the parents or a person who has obtained an order for the child's custody, subsequent to the agreement being made. Where the agency is of the opinion that terminating the agreements would result in the child being in need of protection, then the child may be brought before a tribunal to determine the matter under protection legislation and/or community codes.

226. **We recommend** that a child, who has consented to an agreement and wishes to terminate it, shall be provided with an advocate. If the advocate so recommends the child will be heard by a tribunal upon notice to the parents and agency. Paragraph 224 would apply. The tribunal would decide whether the child could initiate further proceedings and if so, how often.

227. **We recommend** that there be provision in the legislation that if a temporary care agreement expires but it is deemed to be in the child's best interests and all parties consent, then there should be no interruption in the child's care due to the agreement lapsing, but in no event shall total time in care by way of agreement exceed 24 months.

228. **We recommend** that either a tribunal or the Minister should review the reasons for movement of a child in care by way of special needs agreement, between institutions. This can also be reviewed by the Minister or tribunal on a semi annual or annual review. The Minister or tribunal should have the power to order reports and/or services of an amicus/advocate for the child.

229. **We recommend** that provision be made in the legislation that the information required by tribunals can be provided by written reports, telephone, or fax or other means of transferring information.

230. **We recommend** that telephone reviews can take place or other procedures that facilitate timely reviews.

Aboriginal Justice Council or Court Ordered Intervention

231. **We recommend** that wherever possible tribunals that deal with child protection issues should be community based Aboriginal Justice Councils.

232. **We recommend** that the following be incorporated into legislation and should govern all decision makers:

(A) **We recommend** that mandatory reporting of child abuse be required similar to what presently exists under the *Child Welfare Act* and that there be penalties for those who do not obey the legislation. It may be necessary to review the penalty section to ensure that prosecutions can take place.

(B) **We recommend** that the legislation state that an ordinary application should be the usual method by which child protection proceedings are brought before a tribunal. **We recommend** that limits on the power to apprehend be set out in legislation and, where possible, a warrant should be obtained before removing a child from its parents, unless it is not practical within this large jurisdiction to obtain that warrant, as a result of time, location, disruption of communication services, etc.

(C) **We recommend** that reasonable grounds (see D a iii) must be required before a child is removed from the home and **we recommend** that if a child is removed without a warrant, that a verbal confirmation by a tribunal be made within 48 hours or as soon as is practical under the circumstances. We recommend that to obtain a warrant or confirmation there should be provision to facilitate exchange of information including use of facsimiles, telephones, photocopies, etc.

(D) **We recommend** the following be considered for a child in need of protection.

a. The concept of a child "in need of protection" is central to any level of involuntary intervention in the life of a child or family:

- if credible information is received by an agency which suggests that a child may be in need of protection, the agency will be required and authorized to conduct an investigation;

- if, after an investigation, the agency concludes that there are reasonable grounds to believe that a child is in need of protection, then the agency has three options:

i. to offer services to the family and to enter into a voluntary agreement with the family to provide either support services or temporary residential care;

ii. if the family does not choose to accept the offer of services, or the agency is not satisfied that the level of services which is agreeable to the family, or which could be provided on a voluntary basis, is sufficient to protect the child, then the agency is required to initiate proceedings before the

tribunal so that the council can hear from all parties and decide if the child is, or is not, in need of protection;

iii. if the agency has reasonable and probable grounds to believe that there would be a substantial risk to the health or safety of the child, if he or she remained with the family during the time required to make an application to a tribunal and no other temporary arrangement is available or adequate to protect the child, then the agency is required to attempt to get a warrant to apprehend the child, or initiate proceedings before a tribunal if a warrant was not obtained;

If, after hearing evidence from all parties, the community tribunal decides that a child is in need of protection, and that tribunal-ordered intervention is necessary to protect the child in the future, then an order can be made which will require some sort of supervision, or services, or foster placement in order to ensure that the child is protected.

b. Because the authority of the agency to intervene and the authority of the community tribunal to confirm intervention on an involuntary basis rests upon a belief that a child is "in need of protection," the definition of these words is very important. The definition must be able to be applied in the Northwest Territories where there is a wide variety of child-rearing practices. The Working Group **recommends** that, in order to achieve this goal, the legislation must do two things:

i. it must state clearly the grounds which identify the minimum standard of care that all families must provide their children, and

ii. it must authorize aboriginal communities to define their own parenting standards which can then be applied for evidentiary purposes in proceedings before a tribunal.

For example, if one of the legislated standards uses the word "neglect", that standard would be applied in all communities, but individual communities could develop their own definition of what type of behaviour is considered to be "neglect" according to their culture and tradition.

c. The first objective is to state clearly the grounds which identify the minimum standard of care that all families must provide for their children. **We recommend** that the grounds should be specific, objective and should refer to the particular harms to the child which are sought to be prevented.

(E) **We recommend** the following grounds to establish that a child is in need of protection be included in the legislation:

a. the child has suffered physical harm inflicted by his/her parents or caused by the unwillingness or inability of his or her parents to protect him/her adequately; or

b. there is a substantial risk that the child will suffer physical harm inflicted or caused as described in clause a; or

c. the child has been sexually molested or sexually exploited by his/her parent(s), or by any other person in circumstances where the parents knew, or should know, of the possibility of sexual molestation or sexual exploitation and are unwilling or unable to protect the child; or

d. there is a substantial risk that the child will be sexually molested or sexually exploited as described in clause d; or

e. the child is in need of medical treatment to cure, alleviate or prevent serious physical harm or suffering and his or her parents do not provide, or refuse, or are unavailable or unable to provide, or consent to, the necessary treatment, medical or otherwise; or

f. the child has been abandoned, his/her parents have died or are unavailable to care for the child, and the extended family has not made provision for the child's care and custody; or

g. the child suffers from an emotional condition, which is evidenced by severe anxiety, depression, withdrawal, aggressive behaviour towards self or others, destructive behaviour or development impairment, and the condition is confirmed by medical evidence and/or experienced community evidence; in circumstances where the parents are unable or unwilling to remedy or alleviate the harm, or to provide, or consent to services, or healing processes necessary to remedy or alleviate the harm; or

h. there is a substantial risk that the child will suffer emotional damage of the kind described above and the child's parent(s) do not provide or refuse or are unable or unavailable to consent to treatment to remedy or alleviate the condition.

i. Child protection legislation in most provinces contains some provision to allow the community to intervene when children under 12 are committing acts which would make them subject to the *Young Offenders Act* if they were older. It can be argued that this type of provision is not designed to prevent harm to children and that it should not, therefore, be part of child protection legislation. On the other hand, it can be argued that pre-criminal behaviour in young children is a sign of problems which are better dealt with by

community agencies whose mandate is to assist, not to punish. Again, there is not complete agreement within the Working Group but the majority **recommend** that if the child is less than 12 and has killed or seriously injured another person or has persisted in injuring others or causing damage to the property of others, and services and healing processes are necessary to prevent a recurrence and the parents are unwilling or unable to provide or consent to those services or healing processes, then the child is in need of protection.

The Working Group acknowledges that the researchers (especially from the Eastern Arctic) indicated to the Working Group that communities want to be able to intervene if criminal activity is taking place. There appears to be a serious concern with young children being involved in criminal activity in Eastern Arctic communities.

j. It was also brought to the attention of the Working Group by the aboriginal researchers that there is a concern about the use of solvent abuse and older children encouraging the use of (pushing) solvents to younger children. The Working Group is therefore recommending that provision be made that a child is in need of protection, thereby allowing tribunal intervention, when the child is using solvents to the extent that it effects a child's health or emotional or mental well-being or the child is, in effect, acting as a pusher of solvents to other children in the community and the parents are unwilling or unable to properly deal with the situation.

Issues Arising During Tribunal Proceedings

233. **We recommend** that the time period between an apprehension and the next step, whether it be a first court or Aboriginal Justice Council appearance, a return of the child to the parents or placement with a third party, should be as short as possible. **We recommend** a period of seven days where there are community-based courts. Where there are no community-based tribunals, **we recommend** 30 days with the requirement that it be as soon as is practicable or within 30 days, whichever is the soonest. **We do not recommend** the requirement that the matter has to be reviewed if a child has been kept for more than 48 hours. There must be a review if a child has been kept in care for more than seven days.

234. **We recommend** that notice of proceedings be given to the Department, so that the Superintendent of Child Welfare is aware that a child may be in need of protection, to the child's parents, the applicant, and if it is not a community-based tribunal, then to a representative from the community, and from the extended family.

235. **We recommend** that a child should be able to be represented by an advocate if appearing before an Aboriginal Justice Council, and/or the Department of Justice

amicus if appearing before a court. A child who is over the age of 12 years should be entitled to notice and, if the tribunal so determines, should be entitled to be present at the hearing. Vicki Trerise disagrees with this latter provision, because she believes that it would not be in the best interests of the child.

236. **We recommend** that the child should have the right to initiate proceedings under this legislation.

237. It would be unusual for a tribunal to make a final decision about whether a child is in need of protection at the first appearance. Therefore, the issue of how the child should be cared for during the proceedings is important, and will be the major issue at the first appearance. If the parties are not ready to conduct a hearing at the first appearance, then **we recommend** that a hearing should be scheduled at the first possible opportunity, and certainly within three weeks of the first appearance if before an Aboriginal Justice Council. If before a non-community-based council, then within six weeks. The representative of the Law Society feels that matters could be dealt with more expeditiously.

238. **We recommend** that, consistent with the guidelines, legislation require the decision making body to keep the child within the (extended) family during the proceedings if this is not detrimental to the safety and protection of the child.

239. **We recommend** that there be a rebuttable presumption that the child should remain with or be returned to, the parents or extended family, during an adjournment or be with them subject to supervision and/or reasonable terms and conditions, unless the applicant can show that there are reasonable grounds to believe that there is risk to the child's health or safety and no arrangement in the home (e.g. supervision or homemaker service) would provide adequate protection for the child.

240. **We recommend** that the decision-making body have the power to order the family to work with a homemaker or social worker as a preventative measure to removing the child from the home.

241. **We recommend** that before an adjournment is ordered, the tribunal should be directed to consider the effect upon the child of any delay. The tribunal should be directed to make a disposition about whether the child is in need of protection and where the child should be placed within four months if local councils are used or six months if regional councils or the present court system is used. If the tribunal cannot make such a disposition then the reasons should be placed on the record and a copy sent to the Ministers of Justice and Social Services. The representative of the Law Society notes that these time limits should be considered as the absolute maximum limits.

242. **We recommend** that a tribunal can admit and act on evidence at an adjournment that the court considers credible and trustworthy in the circumstances.

243. **We recommend** that if a tribunal concludes that a child must be placed in the care and custody of someone other than the family during the adjournment period, the tribunal can order access on terms and conditions. However, an order should not require foster parents to deal directly with the natural parent or former guardian for the purpose of providing access. Whenever a child is not placed with the family, either at adjournment or for temporary care, the priority lists of placement apply.

244. **We recommend** that for every council proceeding the child and/or the family should have access to the community advocate and if the interests are in conflict or there is any question that the interest may be in conflict, then they shall have separate advocates. For court proceedings, the child should have access to the Department of Justice amicus. It is implicit that parents and other parties can have legal counsel or other representation before the court.

245. **We recommend** that at the hearing to decide whether the child is in need of protection and/or for the placement of the child, that the *Evidence Act* be amended to allow for the following:

    a. heresay evidence may be admitted with the tribunal determining the reliability and weight that should be given to such evidence,

    b. a child may testify, or if he or she is not capable of testifying, the views of the child should be considered by the tribunal,

    c. opinion evidence may be given but the weight will be determined by the tribunal, and

    d. a parent is a competent and compellable witness.

    The representative of the Law Society disagrees with provisions a, c and d.

246. **We recommend** that the NWT *Evidence Act* be amended immediately to ensure that the rules of evidence applying to the testimony of children are consistent with the recent amendments to the Criminal Code dealing with corroboration and allowing children to testify on closed circuit television and/or behind screens. The Department of Justice should begin work immediately to ensure that these options are available to the court in any community in any case where children may have to testify.

247. **We recommend** that evidence given, or dispositions made at previous hearings, whether criminal or civil, with respect to the same child and/or his/her sibling(s), may be accepted by the tribunal at its discretion. The tribunal can determine the weight it shall give to such evidence.

248. **We recommend** that if a child is to testify, then consideration has to be given to the fact that it is often very difficult for a child to provide evidence that implicates his or her parents and, therefore, the child should be able to testify in physical surroundings that separate the child from his/her parents or caregivers. Cross examination should take place in this location. We encourage the government to arrange for portable equipment that can be used in any community. If this equipment is not available, then the tribunal should have the power to order the use of a screen that could be placed between the child and anyone in the courtroom, who the tribunal so orders, should be screened from the child.

249. **We recommend** that the tribunal shall have the discretion to allow a child to give his/her evidence through questions directed by someone with whom that child feels comfortable. We recognize that for aboriginal children they may be more comfortable responding to questions from a person such as a teacher or a respected community member who speaks their aboriginal language.

250. **We recommend** that hearings shall be held in private unless the tribunal so orders and the tribunal would have to consider the wishes and interests of the parties and whether the presence of the public would cause emotional harm to a child who is a witness or is a participant, or is the subject of a hearing.

251. **We recommend** that the tribunal may make an order to allow or disallow the media or prohibiting the report of the hearing or a specified part of the hearing and, in particular, no person shall publish or make public information that has the effect of identifying a child who is a witness or a participant of a hearing or who is the subject of a proceeding, or the child's parent or a foster parent, or a member of the child's family.

The Decision of the Tribunal

252.

a. After hearing from all the parties, the tribunal may decide that the child was in need of protection at the time that the proceedings were initiated.

b. The tribunal must go one step further, and decide that intervention through an order is necessary to provide for the ongoing protection of the child. If this is not the case, for example, because it is not foreseeable that the circumstances in which the child was placed at risk will happen again, then the tribunal may decide that an order is not necessary.

c. If the tribunal decides that an order must be made to provide for the ongoing protection of the child, then a second stage of the hearing should begin. The tribunal should not hear evidence about alternative options for the child, or begin

to consider the question of where the child should be, if not with the family, until after a decision has been reached that the child is in need of protection. This provision for a two-stage hearing is designed to protect the family from having its circumstances compared to the circumstances that the child could receive in another setting. The presumption and principle that the family is responsible for the care and supervision of its children can only be displaced by a decision of a tribunal that the child, in his or her present circumstances, is in need of protection as defined by law and interpreted within the community context. Only after that finding can the tribunal and the agency shift their premises to consider the next question - "Given that the child is in need of protection, what living and care arrangement will be in the best interests of the child?"

d. A tribunal should be referred to the following considerations when making any order or determination in the best interests of the child:

i. The child's relationships are through blood or adoption.

ii. Where a person is directed to make an order or determination in the best interests of the child, when the child is an aboriginal child, the person shall take into consideration the importance, in recognition of the uniqueness of aboriginal culture, heritage and tradition, of preserving the child's cultural identity.

iii. The child's physical, mental and emotional level of development.

iv. The child's physical, mental and emotional needs and the appropriate care or treatment to meet those needs.

v. The religious faith, if any, in which the child is being raised.

vi. The importance for the child's development of a positive relationship with a parent and a secure place as a member of the family.

vii. The importance of continuity in the child's care and the possible effect on the child of disruption on that continuity.

viii. The merits of a plan for the child's care proposed by the Department, including a proposal that the child be placed for adoption, compared with the merits of the child remaining with or returning to a parent.

ix. The child's views and wishes if they can be reasonably ascertained.

x. The effects on the child of delay and the disruption of the case.

xi. The risk that the child may suffer harm through being removed from, kept away from, returned to, or allowed to remain in, the care of a parent.

xii. Any other relevant circumstances.

e. The basic orders available to the tribunal should be as follows:

i. that the child be placed with, or returned to, a parent, member of the extended family or another person, subject to supervision by the agency, for a specified time of not more than 12 months without further review of the tribunal. Conditions can be imposed upon any party by the tribunal during the period of supervision.

ii. that the child be committed to the temporary care and custody of the agency for a specified period of time of not more than 12 months and during this period of time access can be ordered. At the end of 12 months, if the agency is not prepared to return the child to the care of the parents, then a review should be required, before the tribunal, upon notice to all parties and another hearing should be held.

iii. that the child be committed to the temporary care and custody of the agency for a specified time and then be returned to a parent, member of the extended family or other person, subject to the supervision of the agency for a further specified time and subject to the imposition of conditions. Provision should be made in the legislation for a review of these orders so that they can be varied earlier or at the end of the term. Provision should also be made for access as set out above.

iv. that the child be committed to the permanent care and custody of the Department. Again, access should be available for the tribunal to order, in appropriate cases.

For any aboriginal child removed from care of his or her custodians temporarily, placement should be according to the same priorities set out under adoption.

253. **We recommend** for consent orders that there be special requirements that before a tribunal makes an order that would remove the child from the parent's or caregiver's care and custody, it must consider whether the agency has offered the parent any child services that would enable the child to remain with the parent. Where the child is 10 years of age or older the child must have consulted with an advocate or independent legal counsel in connection with consent. The tribunal must be satisfied that the parent, and where the child is 10 years of age or older, the child, understand the nature and consequences of the consent, that it is voluntary, and where the child is 10 years of

age or older the child consents to the order being made. The tribunal shall have discretion to waive the child's consent.

254. **We recommend** that an appeal process be put in place to allow appeals from Aboriginal Justice Councils to another body that the community region recommends. An example would be Social Assistance Appeal Boards or the courts. The appeal process would be developed in consultation with the regions/communities.

Foster Parents

255. **We recommend** that a review panel process for foster parents and children in their care be developed to allow foster parents to challenge decisions made by the agency. An informal appeal process for foster parents and the placement of children in their care should be developed by the agency for foster parents until legislation provides for a review panel.

Vicki Trerise disagrees with any measures that would effectively give foster parents standing. She believes that it is the obligation of the Department of Social Services to establish policies and guidelines for communication between foster parents of social workers and to ensure that the concerns of foster parents are brought to the attention of decision-makers.

256. **We recommend** that there be set out in regulations or elsewhere the responsibilities of workers with the Department on procedures from an initial contact with a family until the Department is no longer involved. This would include guidelines as to how reports should be prepared and what information they should contain, how case plans are to be developed and reviewed and the involvement of the foster parents in case plans.